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U. S. Supreme Court

UNITED STATES REPORTS

VOLUME 246

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1917

FROM MARCH 4, 1918, TO MAY 6, 1918

ERNEST KNAEBEL

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, Chief Justice.
JOSEPH McKENNA, Associate Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIAM R. DAY, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
MAHLON PITNEY, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
JOHN H. CLARKE, Associate Justice.

THOMAS WATT GREGORY, Attorney General.
JOHN WILLIAM DAVIS, Solicitor General.
JAMES D. MAHER, Clerk.
FRANK KEY GREEN, Marshal.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

135405

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, J. C. MCREYNOLDS, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JOHN H. CLARKE, Associate Justice.

For the Eighth Circuit, WILLIS VAN DEVANTER, Associate Justice.

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

[1] For next previous allotment see 241 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1917.

ARMOUR & COMPANY *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 127. Argued January 3, 1918.—Decided March 4, 1918.

A law of Virginia (Acts 1915, c. 148, p. 233) imposes a license tax on merchants doing business in the State based on the amount of purchases during the license period, including as purchases all goods, wares and merchandise manufactured by the licensee and sold or offered for sale in the State; but excludes from its operation manufacturers taxed on capital by the State, who offer for sale at the place of manufacture the goods, wares and merchandise manufactured by them. The Court of Appeals of the State having interpreted this exclusion as open to all, including non-citizens and non-residents, who manufacture in Virginia, and the license as extending as well to those who manufacture in Virginia and sell the goods at places other than the place of manufacture, as to those who manufacture without and sell within the State. *Held*; that the license tax, as applied to a New Jersey corporation, and as computed on the basis of merchandise manufactured by it in other States and shipped into Virginia for sale at its agencies there, does not offend the equal protection clause of the Fourteenth Amendment, or abridge the privileges and immunities of the corporation guaranteed

by that Amendment and by Art. IV of the Constitution, or constitute, either inherently or by necessary operation and effect, an unconstitutional burden on interstate commerce.

118 Virginia, 242, affirmed.

THE case is stated in the opinion.

Mr. Eppa Hunton, Jr., with whom *Mr. H. T. Hall* was on the briefs, for plaintiff in error:

It is not denied that under the construction placed upon this statute by the Supreme Court of Appeals of Virginia there is no discrimination against manufacturers because they do not have their residence in the State; but it is maintained that there is a discrimination against goods which are not manufactured in Virginia, in favor of goods which are manufactured therein, in this, that where goods are manufactured there the manufacturer may sell them at the place at which they are manufactured without any merchant's license tax for so doing, and that it is a matter of common knowledge that the greater part of manufactured goods are thus sold.

The result of this legislation is that a resident manufacturer, being taxed on his capital in Virginia, has the right to sell, and does sell, the great bulk of his manufactured products without paying any merchant's license therefor, whereas the manufacturer who undertakes to sell goods not manufactured in Virginia, must pay the merchant's license tax on all such sales. That this discrimination is unconstitutional, see *Commonwealth* v. *Myer*, 92 Virginia, 809; *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148; *Ward* v. *Maryland*, 12 Wall. 418; *Welton* v. *Missouri*, 91 U. S. 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446. See especially *Brimmer* v. *Rebman*, 138 U. S. 78. This case holds that the constitutionality of a statute is not determined by the fact that it applies to residents as well as non-residents, but by its practical

operation, although there may be no purpose upon the part of the legislature to violate the provisions of the Constitution. *Darnell & Son* v. *Memphis*, 208 U. S. 113. Distinguished *New York* v. *Roberts*, 171 U. S. 658; *Plummer* v. *Coler*, 178 U. S. 115; and *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445.

Mr. J. D. Hank, Jr., Assistant Attorney General of the State of Virginia, with whom *Mr. Jno. Garland Pollard*, Attorney General of the State of Virginia, and *Mr. Leon M. Bazile* were on the brief, for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

This suit concerns § 45 of the Virginia general taxing statute, as amended in 1915, which is in the margin.[1] It will be observed that the section imposes an annual license tax upon all persons or corporations carrying on a

[1] "Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them. To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue, for the district for which he was licensed, showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State. . . ." Acts of 1915, c. 148, p. 233; Virginia Code, vol. 4, p. 594.

merchandise business at any place in the State, the amount being determined by the sum of the purchases during the year. It will be further seen that the amount of the purchases includes "all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise," and that the section also contains a provision excluding from the operation of the license "manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them."

Armour & Company, a New Jersey corporation engaged in the packing house business, and having various establishments in several States, carried on in Virginia the merchandise business of selling packing house products at the respective agencies which they had established. For the purposes of the merchant's license in question the company was called upon to return the sum of its purchases, including the amount shipped into the State for sale at its agencies, whether or not manufactured by it. The corporation declined to comply and commenced this suit to enjoin the enforcement of the statute in so far as it required the inclusion in the amount of purchases of merchandise manufactured by the corporation in other States and shipped into Virginia for sale. It was charged that to the extent stated the statute was in conflict with the Constitution of the United States because of the provision excluding from liability for license persons who manufactured merchandise in Virginia and sold the same at the place of manufacture for the following reasons: (a) Because as the result of such exclusion the statute discriminated against the company to the extent that it shipped goods manufactured by it into Virginia to be sold and therefore was a direct burden on interstate commerce. (b) Because the statute deprived manufacturers in other States of the benefit of § 2 of Article IV guaranteeing to the citizens of each State "all privileges and immunities

of citizens in the several States." And (c) because the statute in the respects stated was repugnant to the equal protection and privilege and immunities clauses of the Fourteenth Amendment.

The trial court enjoined the enforcement of the statute to the extent complained of and its action on appeal was reversed by the court below. It was held that the statute was inherently within the state legislative power and that the difference between a manufacturer selling goods by him made at the place where they were manufactured and one engaged in a mercantile business even if his business consisted in whole or in part of the selling of goods by him manufactured at a place other than the place of manufacture was such as to afford adequate ground for their distinct classification and hence justified the provision of the statute including one in the merchant's license and excluding the other. In addition, construing the statute, it was decided that it was not discriminatory since the exclusion from the license tax of manufacturers selling at their place of manufacture was open to all whether non-citizens or even non-residents who manufactured in Virginia and because the liability for the merchant's license embraced even those who manufactured in Virginia if they sold as merchants the goods by them manufactured at a place other than the place of manufacture. From this latter conclusion it was decided that if any disadvantage resulted to the person selling as a merchant in Virginia goods manufactured by him in another State by subjecting him to a license when such license did not include the manufacturer selling in Virginia at the place of manufacture, the disadvantage was a mere indirect consequence of a lawful and non-discriminatory exercise of state authority and afforded no basis for holding the statute to be repugnant to the clauses of the Constitution of the United States as contended. 118 Virginia, 242.

All the constitutional grounds which were thus held

to be without merit are within the errors assigned and relied upon although predominance in argument is given to the asserted repugnancy of the statute to the commerce clause of the Constitution; and we come briefly to consider them all.

In the first place, we are of opinion that the distinction upon which the classification in the statute rests between a manufacturer selling goods by him made at their place of manufacture and one engaged as a merchant in whole or in part in selling goods of his manufacture at a place of business other than where they were made is so obvious as to require nothing but a mere statement of the two classes. All question concerning the equal protection clause of the Fourteenth Amendment may therefore be put out of view.

In the second place, we are also of opinion that the interpretation given by the court below to the statute excludes all basis for the contention that the provision of the statute imposing the license tax upon the one class and not upon the other gave rise to such discrimination as resulted in a direct burden upon interstate commerce. And this whether the statute be considered from the point of view of the power of the State to enact it inherently considered, or of the power as tested by the necessary operation and effect of the statute, if any, upon interstate commerce and the plenary and exclusive power of Congress to regulate the same.

In the third place, we also conclude that, as the subject matter of the statute was plainly within the legislative authority of the State and as the previous conclusions exclude the conception of the repugnancy of the statute to the provisions of the Constitution just considered, it necessarily follows that there is no ground for the assertion that the statute conflicted with the privileges and immunities clause of Article IV of the Constitution or of the clause in the Fourteenth Amendment providing that,

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

But, it is urged, the statute should be held to be a burden on interstate commerce and repugnant to the Constitution because of the disadvantage to which, it is insisted, it necessarily by way of a license tax subjected goods manufactured in another State when sold in Virginia by a merchant manufacturing the same, while no such tax was by the statute imposed on a manufacturer in Virginia selling his goods so manufactured at the place of their manufacture. But we have already tested the statute by its necessary operation and effect and found it not to be repugnant to the commerce clause. Hence this argument but repeats in a different form a contention already disposed of. It follows therefore that, if the asserted disadvantage be real and not imaginary, it would be one not direct because not arising from the operation and effect of the statute, but indirect as a mere consequence of the situation of the persons and property affected and of the non-discriminating exercise by the State of power which it had a right to exert without violating the Constitution—which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government.

In other words, to resume, the error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed or because of the unlawful discriminations which its provisions express or by operation necessarily bring about and the indirect and wholly negligible influence on interstate commerce, even if in some aspects detrimental, arising from a statute which there was power to enact and in which there was an absence of all discrimination, whether express or implied as the result of the

necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling. *New York* v. *Roberts*, 171 U. S. 658; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445. In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power or if within the power possessed were intrinsically repugnant to the commerce clause because of discriminations against interstate commerce which they contained.

Affirmed.

BOSTON STORE OF CHICAGO *v.* AMERICAN GRAPHOPHONE COMPANY ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 363. Argued January 16, 1918.—Decided March 4, 1918.

Certificates of the facts constituting the basis for questions propounded to this court by the Circuit Court of Appeals should be prepared with care and precision.

Where the bill in the District Court claimed protection for a price-fixing contract under the patent laws, and the want of merit in the claim was not so conclusively settled by decision when the bill was filed as to make the claim frivolous, the court had jurisdiction to pass upon the case as made by the bill, that is, to determine whether the suit arose under those laws.

Where a patent owner delivers patented articles to a dealer by a transaction which, essentially considered, is a completed sale, stipulations in the contract that the articles may not be resold at prices other or lower than those fixed presently and from time to time by the patent owner are void under the general law, and are not within the monopoly conferred, or the remedies afforded, by the patent law.

Recent decisions of this court denying the right of patent owners, in selling patented articles, to reserve control over the resale or use were not rested upon any mere question of the form of notice attached to the articles or the right to contract solely by reference to such notice, but upon the fundamental ground that the control of the patent owner over the articles in question ended with the passing of title.

The courts must needs apply the patent law as they find it; if this result in damage to the holders of patent rights, or if the law afford insufficient protection to the inventor, the remedy must come from Congress.

THE case is stated in the opinion.

Mr. Walter Bachrach and *Mr. Hamilton Moses*, with whom *Mr. Joseph W. Moses* was on the briefs, for Boston Store of Chicago.

Mr. Elisha K. Camp, *Mr. Daniel N. Kirby* and *Mr. James M. Beck*, with whom *Mr. Gilbert H. Montague* was on the briefs, for American Graphophone Co. *et al.*:

Whether or not a patentee, in dealing with his monopoly right to sell, owns or retains title to the physical article, is not conclusive as to his intent in disposing of his monopoly right to sell. He may conditionally dispose of the right to sell, even though he had or has no title to the article itself. *Bement* v. *Harrow Co.*, 186 U. S. 70, 88, 91, 92, 93. The principle decided in the *Bement Case* also supports the proposition that a conditional sale of the article, subject to a reserved part of the monopoly right to sell, rests upon the patent laws. That case was not modified by the later cases. Thus, *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, was limited to an effort to enforce

a price restriction by "mere notice." Likewise, *Henry* v. *Dick Co.*, 224 U. S. 1; *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; and *Bauer* v. *O'Donnell*, 229 U. S. 1. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, involved no question of patent law.

The fact that the gross money consideration was paid is not conclusive, but is merely one of the evidential facts to be considered, in determining the ultimate fact, the intent. The future observance by the licensee or purchaser, of the restrictions on resale expressed in the agreement, was of far greater value to the patentee than the money consideration. The mere fact that there is a contract between the patentee and his grantee does not force the conclusion that his right and remedy rest solely upon contract, and not at all upon the patent law, if the subject-matter of the contract consists in part of a monopoly right which is also the subject-matter of the suit.

The contract was not violative of the Sherman Act or contrary to public policy. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. Rep. 566, 568; *United States* v. *Quaker Oats Co.*, 232 Fed. Rep. 499, 502; *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. Rep. 593; *Ford Motor Co.* v. *Benjamin E. Boone, Inc.*, 244 Fed. Rep. 335; *Grogan* v. *Chaffee*, 156 California, 611; *Ghirardelli* v. *Hunsicker*, 164 California, 355; *Fisher Flouring Mills* v. *Swanson*, 76 Washington, 649; *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271, 281–283; *Park & Sons Co.* v. *Hartman*, 153 Fed. Rep. 24; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Bauer* v. *O'Donnell*, 229 U. S. 1. The rule against restraints upon alienation, so far at least as concerns so-called resale price arrangements affecting articles in interstate commerce, is merged in the comprehensive prohibitions of the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 49–64; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 178–181. The rule

is against limitations and qualifications upon the property interest, the title, of the purchaser and sub-purchasers of the article; and, so far as concerns the contractual capacity of the vendor, the rule does not operate except against attempts by contract to control sub-purchasers as distinguished from purchasers; and even when thus limited and qualified, the rule does not apply to certain articles whose acquired, intangible attributes distinguish them commercially from similar commodities in the same line of commerce. This and other federal courts have held that trading stamps and railroad tickets are sound exceptions to the rule against restraints upon the alienation of personal property. *Park & Sons Co.* v. *Hartman*, 153 Fed. Rep. 24, 31; *Bitterman* v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205, 222; *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. Rep. 800; *Sperry & Hutchinson Co.* v. *Weber & Co.*, 161 Fed. Rep. 219. Neither the Sherman Act nor public policy is offended by an arrangement in the nature of so-called resale price maintenance in any particular case where there is an absence of monopolistic features, and where preëminent good will attaches to and is conveyed with the article, and where the arrangement is limited to the requirements and necessities of this good will, and to the manufacturer's immediate vendee with whom the manufacturer is in direct contractual relation.

Mr. James M. Beck, for American Graphophone Co. *et al.*, filed a separate argument on the question whether a contract of sale, which imposes upon the vendor's immediate vendee a resale price, necessarily and under all circumstances, is invalid. All that was necessarily decided in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, was that where an article of commerce was absolutely monopolized by a given producer, and where therefore no competitive conditions existed in that line of commerce to protect the

consumer, and where the producer, being thus an absolute monopolist, imposed upon all distributors and retailers an interlocking system of contracts, which made competition in prices an impossibility,—that such producer could not, as against one who sustained no contractual relation whatever to the producer, compel him to submit to such price maintenance system. If the contract in a given case is not clearly prejudicial to the public welfare, then the presumptive right of the contracting parties "to do as they will with their own" should be respected. The erroneous idea that any restraint upon the alienation of personal property was void at common law arose out of a misconception of a passage from Coke on Littleton, § 360. Coke, in the context of this very passage, however, and Littleton, in the section of his *Tenures*, on which it is based, both stated that the rule referred only to total restraints upon every mode of alienation, and did not include restraints that were not total, or that left free some right of alienation—like the conditions of the agreement certified in the present case, for instance.

The decision of *Mitchell* v. *Reynolds*, 1 P. Wms. 181 (1711), and all subsequent cases, simply recognized the common law, and the only change of doctrine was the growing recognition by the courts that all restraints upon alienation, growing out of contract, should be recognized as within the fair rights of the contracting parties, unless such restraints were clearly prejudicial to the public welfare. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179.

As the legal test of a contract is the public welfare, it inevitably follows that the judicial declaration of public policy must conform to changing economic conditions. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 406; *Tuttle* v. *Buck*, 107 Minnesota, 145; *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473.

Applying these considerations to the precise question now under consideration, it is obvious that when a vendor sells a commodity of commerce to a vendee, upon condition that he shall not resell the article at less than a minimum price, no general or absolute restraint of alienation exists. Unless it is plain that such a contract is prejudicial to the public welfare, it must be sustained as within the constitutional rights of both vendor and vendee. In determining this question, this court must recognize that there is a wide variety of circumstances under which such restrictions are imposed. The article may be a necessity of life, or, as in the case at bar, a mere luxury. It may be sold under competitive conditions or, as in the *Miles Medical Case*, under non-competitive conditions. To prevent misconstruction, we do not concede that public policy should solely regard the interests of the consumer. Nevertheless the consumer, especially when necessaries of life are involved, must be a matter of first and chief consideration. Public policy, however, must necessarily take into account the retailer, the distributor and especially the producer, for if the producer cannot economically produce, the consumer must suffer a total deprivation of the product. Where competitive conditions exist (as here), the inevitable working of economic laws protects the consumer not only in giving him the opportunity, if he thinks the resale price unfair, to purchase a competing product, but also because the existence of competitive conditions normally affects the reasonableness of the resale price. No one questions the right of the producer to establish his own depots for the marketing of his products, and in that event to charge the consumer what price he pleases. If he have not sufficient capital to establish his own marketing depots, he can at least consign his goods to his own agents with a similar result. It is well known that either the chain store or the consignment plan is far more expensive than the distribution of a product through dis-

tributors and retailers. It inevitably follows that if the public policy of the nation, as declared by statute or judicial decision, should unreasonably interfere with the right of contract in the matter of resale prices, the strongest producers will, as in the case of the Standard Oil and other great concerns, be driven to market their own products. The result will be that the consumer will not only pay as much but, other things being equal, he will pay more for his product, because upon him the burden of increased expenses generally falls. Thus the small producers may be driven out of business and only the large producers remain; and this inevitably will tend towards partial monopolization. Even if competition in prices is the only element to be considered, the reasonableness even from the standpoint of the consumer of resale prices must depend upon the existence or nonexistence of competitive conditions, and this in itself shows the danger of holding too broadly and rigidly that all such contracts are void. Under modern commercial methods, where the manufacturer of a commodity, not a necessary of life, must often create the market for his wares, not only for himself but for his distributors and retailers, it is obviously impossible for the manufacturer to sell his goods, and after taking his price give no further attention to them. The immense and continuing service in developing and maintaining the value of the product in the present case is no part of any contract of sale between the manufacturer and his immediate vendee. It is a gratuitous service, so far as any contractual obligation is concerned. The manufacturer could withhold it, and if he did, his business, and that of his distributors and retailers, would sooner or later dwindle. It does not follow that the public necessarily pays a larger price. The more phonographs and records sold, the less the overcharge and the greater the ability of the manufacturer to develop the business. We simply maintain that when a manufacturer has created the demand for an

article, and at great expense is aiding his vendee in finding a market, it is not unreasonable, but is consonant with the soundest business methods for him, as the owner of the article, to provide that his immediate vendee, who might otherwise be unable to sell the article, shall not, by cutting prices, make it impossible for the manufacturer to extend him that aid. *McLean* v. *Fleming*, 96 U. S. 245.

There is another and very important consideration. In the great centers of population, department stores, chain stores, and mail order houses have come into existence, unknown in Coke's time. The department store to attract custom often sells a standardized product at less than cost in order to gain a profit by the probable purchase of other articles at a large profit. No trade method is more reprehensible or more restrictive of honest business. Sooner or later the department store to a very substantial degree restrains trade by destroying its competitors, and, with the elimination of many competitors, the demand for the manufacturer's product quickly dwindles, and with a lessened demand, his power to expand commerce by increasing the demand for his products is necessarily destroyed. In this connection the court should apply the doctrine of the so-called "unfair trade" cases, i. e., cases involving fraudulent or unfair efforts to violate common-law trade-names as distinguished from technical trade-marks. It should recognize the existence of a twilight zone between the policy of unlimited price restriction through mere notice and the policy of a partial price restriction through the right of contract, not by creating a new law but by recognizing the fundamental liberty to make a reasonable contract and the rule of common law, which only forbade a complete restraint on alienation. That agreements in respect of so-called resale price maintenance should be sustained unless affirmatively shown to be in derogation of public policy has been held in other jurisdictions. Among many cases can be cited *Grogan* v.

Chaffee, 156 California, 611; *Ghirardelli* v. *Hunsicker*, 164 California, 355; *Commonwealth* v. *Grinstead*, 111 Kentucky, 203; *Weiboldt* v. *Standard Fashion Co.*, 80 Ill. App. 67; *Garst* v. *Harris*, 177 Massachusetts, 72; *Garst* v. *Hall & Lyon Co.*, 179 Massachusetts, 588; *Garst* v. *Charles*, 187 Massachusetts, 144; *Rackemann* v. *River Bank Improvement Co.*, 167 Massachusetts, 1; *Clark* v. *Frank*, 17 Mo. App. 602; *Walsh* v. *Dwight*, 58 N. Y. Supp. 91; *Fisher Flouring Mills Co.* v. *Swanson*, 76 Washington, 649. The English courts have reached the same conclusion. *Elliman Sons & Co.* v. *Carrington Sons, Ltd.* (1901), 2 Ch. Div. 275; *National Phonograph Co., Ltd.*, v. *Edison-Bell &c. Phonograph Co., Ltd.* (1908), 1 Ch. Div. 335.

Public policy requires this liberty of contract. *Printing Company* v. *Sampson*, 19 Eq. Cas., L. R. 462.

Mr. J. Edgar Bull, by leave of court, filed a brief on behalf of Thomas A. Edison, Inc., as *amicus curiæ*.

Mr. Chief Justice White delivered the opinion of the court.

The court below before whom this case is pending, desiring instruction to the end that the duty of deciding the cause may be performed, has certified certain facts and propounded questions for solution arising therefrom. The certificate as to some matters of procedure is deficient in specification and looked at from the point of view of the questions which it asks is somewhat wanting in precision. As, however, the matters not specified are not in dispute and the want of precision referred to is not so fundamental as to mislead or confuse, we are of opinion the duty rests upon us to answer the questions and we come to discharge it, making the statements, however, which we have made as an admonition concerning the duty not to be negligent and ambiguous but to be careful

and precise in preparing certificates as the basis for questions propounded to obtain our instruction.

Without in any degree changing, we re-arrange and somewhat condense the case as stated in the certificate. The American Graphophone Company, a West Virginia corporation, as assignee of certain letters patent of the United States, was the sole manufacturer of Columbia graphophones, grafonolas, records and blanks; and the Columbia Graphophone Company, also a West Virginia corporation, was the general agent of the American Company for the purpose of marketing the devices above stated.

"The American Company, acting through its agent, the Columbia Company, employs in the marketing of its phonographic records and its other products a system of price maintenance, by which system it has been its uniform practice to cause its agent, the Columbia Company, to enter into . . . contracts . . . in the name of the Columbia Company, with dealers in phonographic records, located in the United States and its territorial possessions, to whom the American Company delivers its product, through the Columbia Company, by which it is provided, in part, that in consideration of the prices at which prescribed quantities of the various said products of the American Company are agreed to be delivered to such dealer, the dealer, in turn, obligates himself or itself in selling such products to adhere strictly to and to be bound by and not to depart from the official list prices promulgated from time to time by the Columbia Company for said products, and further expressly covenants not in any way to dispose of any such products at less than such list prices. The American Company fixes and prescribes the prices of its said products, and said contracts when entered into cover all such products of the American Company which may thereafter from time to time be acquired by such dealers from the Columbia Company, without

any new express price restriction contract being entered into at the time when each order for goods subsequent to the entering into of said contract is placed or filled by said dealers.

"In pursuance of said price maintenance system the Columbia Company, acting under said instructions and as the agent of the American Company, entered into [such] contracts with over five thousand dealers in phonographic records located in the United States and its territorial possessions."

The Boston Store, an Illinois corporation established at Chicago, dealt with the American Company through its agent, the Columbia Company, conformably to the system of business which was carried out as above stated. The contract evidencing these dealings, which was typical of those by which the business system was carried on, was entered into in October, 1912, and contained the following clauses:

"No Jobbing Privileges Extended under this Contract.

"*Notice to Purchasers of 'Columbia' Graphophones, Grafonalos, Records, and Blanks.*

"All 'Columbia' Graphophones, Grafonolas, Records and blanks are manufactured by the American Graphophone Company under certain patents and licensed and sold through its sole sales agent the Columbia Phonograph Company (General), subject to conditions and restrictions as to the persons to whom and the prices at which they may be resold by any person into whose hands they come. Any violation of such conditions or restrictions make [s] the seller or user liable as an infringer of said patents.

"After reading the foregoing notice and in consideration of current dealers' discounts given to me/us by the Columbia Phonograph Company (General) I/we Hereby

Agree to take any Columbia product received by me/us from said company, either directly or through any intermediary, under the conditions and restrictions referred to in said notice and to adhere strictly and be bound by the official list prices established from time to time by said Company and that I/we will neither give away, sell, offer for sale, nor in any way dispose of such goods, either directly or through any intermediary, at less than such list prices, nor induce the sale of such goods by giving away or reducing the price of other goods, nor sell or otherwise dispose of any of said goods, directly or indirectly, outside of the United States, and I/we understand that a breach of this agreement will amount to an infringement of said patents and subject me/us to a suit and damages therefor. I/We admit the validity of all patents under which said product is manufactured and hereby covenant and agree not to question or contest the same in any manner whatsoever. I/We further understand and agree that this license extends the right to market said Columbia product from the below mentioned address only, and that a separate contract is required to market said product from a branch store or stores, or through an agent or agencies at any other point.

"I/We acknowledge the receipt of a duplicate of the foregoing notice and contract and that no representations or guarantees have been made by the salesman on behalf of said Company which are not herein expressed. I/We also acknowledge receipt of the official list prices on all Columbia product [s] in force at the date hereof."

This contract contained a note specifying large rates of discount from the list prices for purchases made under its terms, and contained a reference to other lists of net prices covering particular transactions and to the "current Columbia catalogues for list prices on machines, records and supplies."

Under this contract at the time and also subsequent to

its making the Columbia Company delivered to the Boston Store at Chicago a number of graphophones and appliances made by the American Company at the sums fixed in the contract as above stated. This suit arose from a disregard by the Boston Store of the rule as to maintenance of price fixed in its contract, that is, from selling the articles at a less price than that which the contract stipulated should be maintained, and the bill was filed against the Boston Store by the American and Columbia Companies to enjoin the alleged violations of the contract. While the certificate is silent as to the averments of the bill, in the argument it is stated and not disputed that it was based on a right to make the contract for the maintenance of prices in and by virtue of the patent laws of the United States and the resulting right under such laws to enforce the agreement as to price maintenance as part of the remedy given by the patent law to protect the patent rights of the American Company. The court enjoined the Boston Store as prayed from disregarding the terms of the contract as to price maintenance. (225 Fed. Rep. 785.) On appeal the court below made the certificate previously stated and propounded four questions for our decision.

In a general sense the questions involve determining whether the right to make the price maintenance stipulation in the contract stated and the right to enforce it were secured by the patent law, and if not, whether it was valid under the general law, and was within the jurisdiction of the court on the one hand because of its authority to entertain suits under the patent law or its power on the other to exercise jurisdiction because of diversity of citizenship. We at once say, despite insistence in the argument to the contrary, that we are of opinion that there is no room for controversy concerning the subjects to which the questions relate, as every doctrine which is required to be decided in answering the questions is now

no longer open to dispute, as the result of prior decisions of this court, some of which were announced subsequent to the making of the certificate in this case. Under this situation our duty is limited to stating the results of the previous cases, to briefly noticing the contentions made in argument concerning the non-applicability of those results to the case in hand, and then to applying to the questions the indisputable principles controlling the subjects which the questions concern. As, however, the discharge of these duties as to each and all of the questions will require a consideration of the cases to be applied, it must result that if the questions be primarily considered separately, reiteration concerning the decided cases will inevitably take place. To avoid this redundancy of statement we therefore at once, as briefly as we may, state the adjudged cases which are applicable, in order that in the light afforded by one statement concerning them the questions may be considered and answered.

In *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, it was settled that the exclusive right to vend a copyrighted book given by the copyright law did not give to the owner of the copyright and book the right to sell for a price satisfactory to him and by a notice placed in the book fix a price below which it should not be sold by all those who might subsequently acquire it; and that, as such a right was not secured by the copyright law or the remedies which it afforded, a court of the United States had no jurisdiction to afford relief on the contrary theory.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, it was decided that under the general law the owner of movables (in that case, proprietary medicines compounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause

it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables. It was decided that the power to make the limitation as to price for the future could not be exerted consistently with the prohibitions against restraint of trade and monopoly contained in the Anti-Trust Law.

In *Henry* v. *Dick Co.*, 224 U. S. 1, it was held that the owner of a patented machine (a rotary mimeograph) and the patents which covered it had, in selling the same, a right to contract with the purchaser not to use materials essential for working it unless bought from the seller of the machine, and to qualify the condition as a license of the use; that this right included the further right, by notice on the machine of the contract, to affect a third person who might deal with the purchaser with knowledge of the contract and notice so as to make him liable as a contributory infringer if he dealt with the buyer in violation of the terms of the notice. It was further decided that the right to make such contract arose from the right conferred by the patent law, and that jurisdiction to enforce it as against the contributory infringer existed under that law. At the time this case was decided there was one vacancy on the bench and one member of the court was absent. There was division, four members concurring in the ruling which the court made and three dissenting.

Bauer v. *O'Donnell*, 229 U. S. 1, again involved the right of a seller to impose a restraint on the price of future sales. It arose on a certificate from the Court of Appeals of the District of Columbia asking whether the right asserted was within the monopoly conferred by the patent law and whether, therefore, the duty to enforce it under that law obtained, and the power to give the remedy sought as a means of preventing an infringement of the

patent existed. Although pointing out that the restriction on future price which the certificate stated was indisputably void and unenforcible under the general law as the result of the ruling in the *Miles Medical Case, supra,* it was held that that ruling was not necessarily apposite, because the certificate and the question presented restricted the case to determining whether the right to limit the price existed because within the monopoly granted by the patent law, and whether the relief asked was within the remedy which that law afforded. Considering the case in that limited aspect, it was decided: (a) That the exclusive right to vend given by the patent law had the same significance which had been affixed to that word in the copyright law in the *Bobbs-Merrill Case, supra.* (b) That hence, when the holder of a patented article had sold it, the article so sold passed out of the monopoly, and the right to make future sales by one who bought it was not embraced by the patent law and, consequently, that law could not be extended so as to perpetuate its control beyond the limits to which by the operation of law it reached. In other words, the decision was that a patentee could not use and exhaust the right to sell, as to which a monopoly was given him by the patent law, and yet by conditions and stipulations continue that law in effect so as to make it govern things which by his voluntary act were beyond its scope. And (c) that, as a result, where an article had been sold and passed beyond the monopoly given by the patent law, remedies on the theory of infringement were not applicable to acts done which could not have that character. It was hence answered that the controversy and the remedies invoked were not within the patent law. As the case dealt with the right to vend under the patent law, the court reserved any express statement concerning the scope of the right to use conferred by that law.

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490,

the right to fix a permanent marketing price at which phonographs should be re-sold after they had been sold by the patentee was considered. Basing its action upon the substance of things, and disregarding mere forms of expression as to license, etc., the court held that the contract was obviously in substance like the one considered in the *Miles Medical Case* and not different from the one which had come under review in *Bauer* v. *O'Donnell.* Thus brushing away disguises resulting from forms of expression in the contract, and considering it in the light of the patent law, it was held that the attempt to regulate the future price or the future marketing of the patented article was not within the monopoly granted by the patent law, in accordance with the rule laid down in *Bauer* v. *O'Donnell.*

The general doctrines, although presented in a different aspect, were considered in *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.*, 243 U. S. 502. The scope of the case will be at once made manifest by the two questions which were certified for solution. "First. May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented? Second. May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?" The case therefore directly involved the general question of the power of the patentee to sell and yet, under the guise of license or otherwise, to put restrictions which in substance were repugnant to the rights which necessarily arose from the sale which was made. In other words, it required once again a consid-

eration of the doctrine which had been previously announced in *Henry* v. *Dick Co.* and of the significance of the monopoly of the right to use, conferred by the patent law, which had been reserved in *Bauer* v. *O'Donnell.* Comprehensively reviewing the subject, it was decided that the rulings in *Bauer* v. *O'Donnell* and *Straus* v. *Victor Talking Machine Co.* conflicted with the doctrine announced and the rights sustained in *Henry* v. *Dick Co.*, and that case was consequently overruled. Reiterating the ruling in the two last cases, it was again decided that, as by virtue of the patent law, one who had sold a patented machine and received the price, and had thus placed the machine so sold beyond the confines of the patent law, could not, by qualifying restrictions as to use, keep under the patent monopoly a subject to which the monopoly no longer applied.

Applying the cases thus reviewed, there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be equally no doubt that the power to make it in derogation of the general law was not within the monopoly conferred by the patent law and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred.

Thus concluding, it becomes we think unnecessary to do more than say that we are of opinion that the attempt in argument to distinguish the cases by the assumption that they rested upon a mere question of the form of notice on the patented article, or the right to contract solely by reference to such notice, is devoid of merit, since the argument disregards the fundamental ground upon which, as we have seen, the decided cases must rest. Moreover, so far as the argument proceeds upon the assumption of the grave disaster which must come to the holders of pat-

ent rights and articles made under them from the future application of the doctrine which the cases establish, it must be apparent that if the forebodings are real the remedy for them is to be found, not in an attempt judicially to correct doctrines which by reiterated decisions have become conclusively fixed, but in invoking the curative power of legislation. In addition, through perhaps an abundance of precaution, we direct attention to the fact that nothing in the decided cases to which we have referred, having regard either to the application of the general law or of the patent law, deprives an inventor of any right coming within the patent monopoly, since the cases alone concerned whether the monopoly of the patent law can be extended beyond the scope of that law or, in other words, applied to articles after they have gone beyond its reach. The proposition so earnestly insisted upon, that, while this may be true, it does not fairly consider the reflex detriment to come to the rights of property of the inventor within the patent law as a result of not recognizing the right to continue to apply the patent law as to objects which have passed beyond its scope, is obviously not one susceptible of judicial cognizance. This must be, since whether, for the preservation of the rights which are within a law, its provisions should be extended to embrace things which it does not include, typically illustrates that which is exclusive of judicial power and within the scope of legislative action.

It remains, then, only to apply the principles established by the authorities which we have stated to the answers to the questions.

The first question is, "Does jurisdiction attach under the patent laws of the United States?" As we assume under the admissions of counsel that the bill asserted the existence of rights under the patent law, and as at the time it was filed the want of merit in such assertion had not been so conclusively settled as to cause it to be frivolous, we

are of opinion that the court had jurisdiction to pass upon the case as made by the bill, that is, to determine whether or not the suit arose under the patent law and hence as thus understood the question should be answered, yes.

Considering the second and third questions as virtually involving one consideration we state them together:

"2. If so, do the recited facts disclose that some right or privilege granted by the patent laws has been violated?

"3. Can a patentee, in connection with the act of delivering his patented article to another for a gross consideration then received, lawfully reserve by contract a part of his monopoly right to sell?"

Correcting their ambiguity of expression by treating the questions, as they must be treated, as resting upon and deducible from the facts stated in the certificate and therefore as embracing inquiries concerning the contract of sale containing the price maintenance stipulation, it follows from what we have said that the questions must be answered in the negative.

The final question is this:

"4. If jurisdiction attaches solely by reason of diversity of citizenship, do the recited facts constitute a cause of action?"

Upon the hypothesis which this question assumes there also can be no doubt that it must be answered in the negative.

The first question will be certified as answered yes, and the second, third and fourth as answered, no.

And it is so ordered.

MR. JUSTICE BRANDEIS, concurring.

Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is

necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ apparently from those entertained by a majority of my brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to.

MR. JUSTICE HOLMES and MR. JUSTICE VAN DEVANTER are of opinion that each of the questions should be answered in the affirmative.

WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY *v.* INTERNATIONAL CURTIS MARINE TURBINE COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 393. Argued January 29, 30, 1918.—Decided March 4, 1918.

The Act of June 25, 1910, c. 423, 36 Stat. 851, providing, in part, that when patented inventions are used by the United States without license from the owner, or lawful right, the owner may recover reasonable compensation for such use in the Court of Claims, is not to be construed as automatically conferring a general license on the Government to use such inventions and as thereby authorizing their use at the will of private parties in the manufacture of things to be furnished under contracts between them and the United States.

Where, therefore, a company entered into a contract with the United States to build certain vessels which was based on specifications, submitted or approved by the Navy Department, covering in detail the structure, engines, etc., but which contract expressly provided for protecting the Government against any claims which might arise from the infringement by the contractor of the rights of any patentee; and in constructing the vessels installed therein certain patented engines without the consent of the patent owners; *held*, that the Act of June 25, 1910, *supra*, did not operate to relieve the contractor from liability to account for the damages and profits arising from the infringement.

The purpose of the statute is to give further security to the rights of patentees by permitting suit and recovery of compensation in the Court of Claims in those cases where their inventions are availed of for the benefit of the United States by officials of the Government, in dealing with subjects within the scope of their authority, but under circumstances not justifying the implication of contract with the patentees. Aside from exceptional cases where the authority of the United States to take under eminent domain may be said to be exerted in reliance upon this provision for compensation, the act contemplates the possibility of official error or mistake in the invasion of such rights; it does not contemplate the deliberate and wrongful appropriation of such constitutionally protected property by official authority, much less does it intend that mere contractors with the Government may make such appropriations without compensation, in the work under their contracts, upon the assumption that the United States ultimately will be liable under the statute for the rights so elected to be taken.

Crozier v. *Krupp*, 224 U. S. 290, explained and distinguished.

238 Fed. Rep. 564, affirmed.

THE case is stated in the opinion.

Mr. Clifton V. Edwards and *Mr. Abraham M. Beitler* for petitioner:

Crozier v. *Krupp*, 224 U. S. 290, was not decided upon the basis of Crozier being an officer upon salary who derived no pecuniary benefit from the infringement, but with the understanding that that fact became immaterial when Congress passed the Act of June 25, 1910. The transaction was treated as in effect a licensed one; hence

there could be no injunction. The court held, by implication, that there can be no accounting in such a case, for the only theory upon which accounting can be ordered in any patent suit is the theory that defendant is an infringer. If an individual making devices for the Government is not an infringer there is no basis for a decree for either an accounting or an injunction.

If the taking by the Government is under eminent domain, then it follows that the status of the Government is that of a rightful user, in effect a licensee, and the status of the Cramp Company is that of a maker for the licensee, protected by the license. The language of the act makes it applicable to cases where an "invention" is "used," thus not confining it to the mere use of a machine. An invention is used when a machine or composition of matter is either made or used or sold, or when a process is practiced. That the language of the act is broad enough to cover the making of a machine was decided in *Crozier* v. *Krupp* because in that case the matter in dispute was the making of field guns, by Crozier, and not their use by the Government, and the opinion (p. 306) refers to the purpose of the act being to avoid "interference with the right of the Government to make and use." Even if the statute had employed the word "use" in the narrow sense of use of a machine, that would carry with it the implied right to have the machine made. *Illingworth* v. *Spaulding*, 43 Fed. Rep. 827, 830; *Woodworth* v. *Curtis*, 2 Woodb. & M. 524; *Steam Stone-Cutter Co.* v. *Shortsleeves*, 16 Blatchf. 381; *Porter Needle Co.* v. *National Needle Co.*, 17 Fed. Rep. 536; *Dunlop Pneumatic Tyre Co., Ltd.*, v. *North British Rubber Co., Ltd.*, British Patent Trade-Mark Cases, vol. 21, p. 161, 173. It is pertinent to note that the above cases expressly recognized the right of the licensee to have the device made for him by others than himself. To the same effect is *Montrose* v. *Mabie*, 30 Fed. Rep. 234. And the cases above cited expressly state the im-

munity of the maker for the licensee. *Thomson-Houston Co.* v. *Ohio Brass Co.*, 80 Fed. Rep. 720; *Johnson Railroad Signal Co.* v. *Union Switch & Signal Co.*, 55 Fed. Rep. 487.

The fact that the defendant may make a profit out of the making was not a violation of the appellee's (plaintiff's) rights, and the plaintiff is not entitled to a profit on the manufacture. The right to such profit passed with the license, irrespective of the individual who might do the work. What is implied in the statute is as much a part of it as what is expressed. *Gelpcke* v. *Dubuque*, 1 Wall. 220; *Wilson* v. *Bank*, 103 U. S. 770; *Brooks* v. *United States*, 39 Ct. Clms. 494.

The vital question in this case is whether defendant's action is non-infringing or infringing in character. It is absurd to confuse this with the question of whether defendant has made a profit. If the Government is not an infringer, defendant is not liable to an infringement suit, whether it made profit or not. If this court, having decided that the Act of 1910 protects Crozier, an officer of the Government, should now decide that it does not protect the Cramp Company, a contractor with the Government, it must be evident that many intermediate cases will constantly be arising as to which the line will have to be drawn again and again.

An examination of previous cases in the Court of Claims, the Circuit Courts of Appeal, and the Supreme Court shows that the operation of the prior statute law resulted in injustice to patentees in depriving them of compensation for the appropriation of their inventions by the Government, its officers, agents, etc., and in annoyance and harassment of the Government and those dealing with it in the resulting attempts to do indirectly that which could not be done directly. The Government was seriously hampered in respect of its enjoyment of necessary inventions, while patentees, if unable to prove a contract, were

often without relief. So far as we can find, in no case prior to the passage of the Act of 1910 was any officer or contractor actually enjoined or compelled to pay personal profits or damages by reason of the infringement of a patent as a necessary incident to government work. At best, the right even against a contractor was challenged and uncertain. Numerous decisions prior to the act, among them *Dashiell* v. *Grosvenor*, 66 Fed. Rep. 334, had ruled squarely against the right, and this court as late as 1896, in affirming that case, reserved the question. 162 U. S. 425, 434. Numerous cases in the Court of Claims illustrate the Government's extensive use of patents and the difficulties of patentees in getting jurisdiction. And many cases in this and other federal courts show how unsuccessful had been the attempts to obtain injunctive or other relief against officers and contractors. In none of the reported cases is a distinction drawn between an officer and a contractor. Since the right to equitable relief depends upon jurisdiction for the purpose of granting an injunction (*Root* v. *Railway Co.*, 146 U. S. 210), no one had succeeded in collecting any profits or damages from either.

The act meets the situation by writing what is in effect a license agreement between the Government and the patentee. It gives an additional remedy to the patentee—a substantial remedy; it provides that he shall recover compensation, whereas before he could not do so. An object of equal importance was to insure that the Government should be free and uninterrupted in its use of patented inventions. As the Government must always act through its officers and agents, and has customarily carried on a large part of its work through contractors, it is obvious that duly authorized use by these instrumentalities without interference was contemplated by the act. There would have been no object for the Government to pay for the use of an invention, if that payment did not cover the

whole transaction and protect those carrying on the work for the Government.

License agreements may expressly reserve the right to the licensee to contest validity. In the present instance it is as if the Government took a license under such valid patents as it uses. Of course, an express license to use the valid patents of the licensor would not bar the licensee from showing that a particular patent asserted by the licensor was invalid. Under the Constitution, Congress can give inventors an exclusive right, or it can give them no right at all; we submit that the reasonable view is that it can confer some right intermediate between these extremes.

The views of the House Committee are inadmissible; but the report also shows an intention to give the Government the right to appropriate inventions.

When the Government bound itself and the Cramp Company by the execution and delivery of the contracts, the appropriation was made. Those contracts referred to certain plans, specifications and drawings for the turbines. It is not necessary to an appropriation under the right of eminent domain that it should be primarily and explicitly directed to the object taken. If the act is no protection to a contractor following government specifications, then it follows that any patent owner may enjoin contractors from using their patents in following those specifications—an unthinkable result in these times. A final decree of compensation against the United States would be an adjudication that the Government was a wrongdoer in making use of the patented invention, and it would be the duty (at least the moral duty) of the executive branch to cease such wrongdoing.

Mr. Frederick P. Fish, with whom *Mr. Charles Neave* and *Mr. William G. McKnight* were on the brief, for respondents, went minutely into the construction of the statute

and distinguished *Crozier* v. *Krupp*, 224 U. S. 290. Of that case it was said, in part: The court did not decide that the rights and remedies of the patent owner as against private individuals making a private profit have been in any way altered by the act, but merely that suits based on infringement by a government officer acting solely in his public capacity and for the public benefit, can no longer be brought against that officer. The Government, by the Act of 1910, has assumed responsibility for his wrong. That is, the wrongful act of the officer is committed by the authority of the Government, and it ceases to be wrongful so far as the officer is concerned; the Government assumes responsibility and, by virtue of the Act of 1910, recognizes its liability. We do not understand that this court held that the Government's wrong became a right by the Act of 1910, though "in substance," as the court says, it is in the position which, as between individuals, would be the equivalent of that of a licensee in that its appropriation of a patented invention cannot be stopped. It is in this sense, and this sense only, that we understand the court's reference to eminent domain and to the "appropriation of a license." Those expressions are used only when considering the situation "in substance"—"looking at the substance of things"—"the substantial result of the statute." They are illustrative, rather than descriptive, of the legal situation. The Government had, and has, a right to make use of patented inventions, and of any other private property, in the sense that it has the power to do so, and cannot be prevented from exercising that power, as it has never consented to any limitation thereon. Here the defendant, a private corporation, has made a personal profit from its infringement of the plaintiff's patent rights. The plaintiff now seeks to recover from it—not from the Government—that personal profit unlawfully obtained. No such situation was presented in *Crozier* v. *Krupp*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The history of this suit from its commencement up to the development of the controversy now before us, will be shown by an examination of the decided cases referred to in the margin.[1] We shall therefore not recur to that which has gone before but confine our statement to the things essential to an understanding of the phase of the issue which we must now decide.

Under proposals submitted by the Navy Department the petitioner, the Cramp Company, in 1908 contracted to build two torpedo boat destroyers, Nos. 30 and 31, and in 1911 further contracted to build four such boats, Nos. 47, 48, 49 and 50. The specifications submitted by the department as to structure, engines, etc., were comprehensively detailed and the contracts were based either upon the acceptance of such specifications or upon such changes suggested by the contractor as met the approval of the Navy Department. The contracts contained an express provision, which is in the margin,[2] protecting the Govern-

[1] *International Curtis Marine Turbine Co.* v. *Wm. Cramp & Sons Co.*, 176 Fed. Rep. 925; *In re Grove*, 180 Fed. Rep. 62; *International Curtis Marine Turbine Co.* v. *Wm. Cramp & Sons Co.*, 202 Fed. Rep. 932; *Wm. Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, 228 U. S. 645; *International Curtis Marine Turbine Co.* v. *Wm. Cramp & Sons Co.*, 211 Fed. Rep. 124; *Wm. Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, 234 U. S. 755.

[2] "PATENTS. The party of the first part, in consideration of the premises, hereby covenants and agrees to hold and save the United States harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design or suggestion, or for or on account of the use of any patented invention, article, or appliance that has been or may be adopted or used in or about the construction of said vessel, or any part thereof, under this contract, and to protect and discharge the Government from all liability on account thereof, or on account of the use thereof,

ment against any claims which might arise from the infringement by the contractor of the rights of any patentee, if any such rights there were.

The Turbine Companies filed their bill against the Cramp Company to recover damages and profits accruing from the infringement of certain patents on turbine engines which the Cramp Company had placed in the boats built under the contract of 1908. Ultimately this claim of infringement was upheld by the Circuit Court of Appeals for the Third Circuit. 211 Fed. Rep. 124. On the hearing which then ensued before a master as to damages and profits, the Turbine Companies urged their claim and tendered their proof concerning the same, covering the four destroyers, Nos. 47, 48, 49 and 50, built under the contract of 1911, upon the ground of an infringement like that which had been committed as to the boats built under the contract of 1908. *Rubber Co.* v. *Goodyear*, 9 Wall. 800. The inquiry was objected to on the ground of its irrelevancy because liability for infringement under the contract of 1911 was to be tested by a different rule from that which was applicable to the boats contracted for in 1908 in consequence of the applicability to the 1911 contracts of the Act of Congress of June 25, 1910, c. 423, 36 Stat. 851. Under that law, it was insisted, "the United States, by act of eminent domain, acquired a license to use the invention of all existing patents, and, therefore, the transactions under the contracts for torpedo boat destroyers Nos. 47, 48, 49 and 50, being merely the building of devices for a licensee under the patent in suit, were licensed transactions and not infringing transactions, and consequently are not within the scope of this accounting." The master overruled the objection but thereafter on request certified the subject to

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by proper releases from patentees, and by bond if required, or otherwise, and to the satisfaction of the Secretary of the Navy."

the District Court where his ruling was held to be wrong on its merits and reversed. On a rehearing the court sustained the view which it had previously taken of the subject by a reference to a decision of the Circuit Court of Appeals for the Second Circuit (*Marconi Wireless Telegraph Co.* v. *Simon*, 227 Fed. Rep. 906; 231 Fed. Rep. 1021). 232 Fed. Rep. 166. Application was then made to the Circuit Court of Appeals by certiorari to review this ruling and by mandamus to compel the master to proceed with the hearing in accordance with the claims of the Turbine Companies. Finding that the ruling in the *Marconi Case* was pending in this court for review, the Court of Appeals postponed deciding the issue of statutory construction to await the decision of this court, but directed the accounting to proceed as to both classes of contracts in such a manner as to enable the authoritative ruling on the statute when made by this court to be applied without confusion or delay. 238 Fed. Rep. 564. The writ of certiorari on which the case is now before us was then allowed and this and the *Marconi Case* referred to by the court below were argued and submitted upon the same day.

The single question is, did the provisions of the Act of 1910 operate without more to confer upon the United States a license to use the patents of the Turbine Companies; and if so, was the Cramp Company as a contractor authorized to avail itself of the license by using the patent rights of the Turbine Companies without their consent? Avowedly on the very face of the act its purpose was not to weaken the rights of patentees, but to further secure them. This results not only from the title of the law (An Act to provide additional protection for owners of patents of the United States, and for other purposes), but further from the report of the committee of the House of Representatives where the act originated which stated that such was the purpose intended to be accomplished

by the act. (House Report No. 1288, 61st Cong., 2d sess.) The conflict between the purpose thus intended and the construction now claimed for the act is evident unless it can be said that to confer by anticipation upon the United States, by a law universally and automatically operating, a license to use every patent right is a means of giving effect to a provision of a statute avowedly intended for the further securing and protecting of such patent rights.

But passing deducing the meaning of the act from its title and the report of the committee by which it was drafted, it is apparent that the significance which the contention affixes to it is directly in conflict with the text (which is in the margin [1],) since that text expressly declares that the object of the act is to secure compensation for patentees whose rights have been "used by the United States without license"—the very antithesis of a right by license to use all patents which is the purpose attrib-

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[1] "An Act To provide additional protection for owners of patents of the United States, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims: *Provided, however*, That said Court of Claims shall not entertain a suit or reward (*sic*) compensation under the provisions of this Act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further*, That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further*, That the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

uted to the act by the argument. And this is made clearer by considering that the statute itself in directing the proceedings which must be resorted to in order to accomplish its avowed purpose, exacts the judicial ascertainment of conditions which would be wholly negligible and irrelevant upon the assumption that the statute intended to provide in favor of the United States the general license right which the argument attributes to it. This conclusion cannot be escaped when it is considered that if the license, which it is insisted the act in advance created, obtained in favor of the United States, the inquiry into the question of infringement by the United States for which the statute provides would be wholly superfluous and indeed inconsistent with the assumption of the existence of the supposed license.

But let us in addition pass these latter considerations and come not only to demonstrate the error of the construction asserted but to make manifest the true meaning of the statute from a twofold point of view, that is, first, from an analysis of the context of the statute as elucidated by the indisputable principles which at the time of the adoption of the act governed the subjects with which it dealt, and, second, from the consideration of the context and the effect upon it of the ruling in *Crozier* v. *Krupp*, 224 U. S. 290.

At the time of the enactment of the law of 1910 the following principles were so indisputably established as to need no review of the authorities sustaining them, although the leading cases as to all the propositions are referred to in the margin.[1]

(a) That rights secured under the grant of letters pat-

[1] *United States* v. *Palmer*, 128 U. S. 262; *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552; *Belknap* v. *Schild*, 161 U. S. 10; *Russell* v. *United States*, 182 U. S. 516; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Harley* v. *United States*, 198 U. S. 229.

ent by the United States were property and protected by the guarantees of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation.

(b) That although the United States was not subject to be sued and therefore could not be impleaded because of an alleged wrongful taking of such rights by one of its officers, nevertheless a person attempting to take such property in disregard of the constitutional guarantees was subject as a wrongdoer to be controlled to the extent necessary to prevent the violation of the Constitution. But it was equally well settled as to patent rights, as was the case with all others, that the right to proceed against an individual, even although an officer, to prevent a violation of the Constitution did not include the right to disregard the Constitution by awarding relief which could not rightfully be granted without impleading the United States, or, what is equivalent thereto, without interfering with the property of the United States possessed or used for the purpose of its governmental functions.

(c) That despite the want of authority to implead the United States, yet where an officer of the United States within the scope of an official authority vested in him to deal with a particular subject, having knowledge of existing patent rights and of their validity, appropriated them for the benefit of the United States by the consent of the owner, express or implied, upon the conception that compensation would be thereafter provided, the owner of the patent right taken under such circumstances might, under the statute law of the United States permitting suits against the United States on contracts express or implied, recover by way of implied contract the compensation which might be rightly exacted because of such taking.

(d) That where an officer of the United States in dealing with a subject within the scope of his authority infringed patent rights by a taking or use of property for

the benefit of the United States without the conditions stated justifying the implication of a contract, however serious might be the infringement or grave to the holder of the rights the consequences of such infringement, the only redress of the owner was against the officer, since no ground for implying a contract and securing compensation from the United States obtained.

Coming to consider the statute in the light of these principles, there would seem to be no room for controversy that the direct and simple provision, "that whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims," embraces and was intended alone to provide for the discrepancy resulting from the divergence between the right in one case to sue on an implied contract and the nonexistence of a right to sue in another. And this meaning becomes irresistible when the concordance which it produces between the title and the report of the committee is considered on the one hand, and the discord which would arise on the other from reading into the statute the theory of automatic and general license as to every patent which the argument presses. Observe that the right to recover by implied contract as existing prior to 1910 and the right to recover given by that act both rest upon the possession and exertion of official authority, although from the absence of definition in the statute the precise scope of the official power possessed in order to bring the authority into play is not specified but is left to be deduced from the application of general principles. Observe further that, resting thus upon the exercise of official power, it was not assumed before the Act of 1910 or under that act, that the official authority would consciously and intentionally be exerted so as to violate the Constitution

by wrongfully appropriating private property. This follows from a twofold point of view: First, because the basis of the right to sue on implied contract is the fact that official power, recognizing the patent right and the at least implied assent of the owner, had acted in reliance upon the fact that adequate compensation would follow the taking. And second, because, in conferring the right to prove infringement, the Act of 1910 obviously contemplates the possibility of the commission of official error or mistake on that subject and afforded a remedy for its correction and resulting compensation. Thus it is true to say that under both views the theory of universal and automatic appropriation by the United States of a license to use all patent rights is unsupported, since both views assume that official authority would not be wilfully exerted so as to violate the Constitution, and this although it be that the Act of 1910 embraces the exceptional case where, because of some essential governmental exigency or public necessity, the authority of the United States is exerted to take patent rights under eminent domain in reliance upon the provision to recover the adequate compensation which the Act of 1910 affords. And this fundamental characteristic at once exposes the want of foundation for the contention that because the statute made provision for giving effect to acts of official power in taking patent rights under the conditions stated and even when necessary of curing defects in the exertion of such power, therefore it is to be assumed that the statute conferred upon all who contracted with the United States for the performance of work a right to disregard and take without compensation the property of patentees. This must be, since the making of a contract with the United States to perform duties in favor of the United States does not convert the contractor into an official of the United States qualified to represent it and to entail obligations on it which under the terms of the statute can alone rest

upon official action and the discharge of official duty. The making of a contract with the United States and the resulting obligation to perform duties in favor of the United States by necessary implication impose the responsibility of performance in accordance with the law of the land; that is, without disregarding the rights or appropriating the property of others. A contractor with the United States, therefore, is in the very nature of things bound to discharge the obligation of his contract without violating the rights of others, and merely because he contracts with the United States is not vested with the power to take the property of others upon the assumption that as a result of the contract with the United States he enjoys the right to exercise public and governmental powers possessed by the United States.

Nor is there any foundation for the assumption that the ruling in *Crozier* v. *Krupp*, 224 U. S. 290, is in conflict with these self-evident propositions and by necessary implication sanctions the theory of universal license in favor of the United States as to all patent rights and the asserted resulting authority in contractors with the United States for the purpose of the execution of their contracts to disregard and appropriate all such rights.

Stated as briefly as we possibly can, the case was this: In the arsenals of the United States guns and gun carriages were constructed containing appliances which it was asserted infringed patent rights of the Krupp Company. A bill was filed against Crozier, who was Chief of Ordnance of the United States, to enjoin the alleged violation of the asserted patent rights. Crozier demurred to the amended bill on the ground that the court had no jurisdiction because the suit was one against the United States. The trial court dismissed the bill. The Court of Appeals of the District of Columbia reversed because, although it fully conceded there was no jurisdiction over the United States and no power to interfere with its pub-

lic property or duties, it yet considered that there was jurisdiction to restrain the individual, although an officer, from continuing to take property without compensation in violation of the Constitution. A certiorari was granted. It was stipulated in the cause that the structures complained of had been made in all the arsenals of the United States by Crozier, the Chief of Ordnance, and by the United States, and that the United States had asserted the right, and proposed to continue, to make the guns and gun carriages in the future for its governmental purposes and denied the violation of any patent right. It was also stipulated that the Chief of Ordnance had made no profits and that all claims were waived except the claim of right to a permanent injunction at the termination of the suit to prevent the use of the appliances in the future. And that was the solitary issue which here arose for decision.

It was held that in view of the admission as to the nature and character of the acts done by the United States and further in view of the power of the United States to take under eminent domain the patent rights asserted, the provisions of the statute affording a right of action and compensation were adequate to justify the exercise of such power. In accordance with this ruling it was decided that there was no right to an injunction against the Chief of Ordnance as an individual and the parties if their rights had been infringed were relegated to the compensation provided under the Act of 1910. In reaching this conclusion the statute was critically considered principally for the purpose of determining whether the right to recover compensation which the act afforded was adequate to fulfill the requirements of compensation for rights taken as protected by the Constitution. It is true in the analysis which was made of the statute for this purpose it was said that the consummated result of the Act of 1910 in any particular case was to confer upon the United States a license to use the patent right (p. 305).

But the use of the word "license" affords no room for holding that it was decided that the statute provided for the appropriation by anticipation and automatically of a license to the United States to use the rights of all patentees as to every patent. And clearer yet is it that the use of the word "license" affords no ground for the proposition that the statute invested every person contracting with the United States for the furnishing of material or supplies or for doing works of construction with public powers and transferred to them the assumed license to violate patent rights to the end that they might be relieved of the obligations of their contracts and entail upon the United States unenumerated and undetermined responsibility upon the assumption that the United States would be ultimately liable for the patent rights which the contractors might elect to take. Through abundance of precaution, however, we say that if any support for such contentions be susceptible of being deduced from the use of the word "license" in the passage referred to, then the word must be and it is limited, as pointed out by the context of the opinion and by what we have said in this case, to the nature and character of use which was contemplated by the statute and which is consonant with the execution of its limited though beneficent purpose and not destructive of the same.

Under the view which we have stated it follows that the court below did not err in ordering the accounting under the 1911 contracts to proceed so that the statute when correctly construed might be applied. To the end, therefore, that effect may be given to such accounting as ordered by the court below our decree will be

The order of the Circuit Court of Appeals to the extent that it directed the accounting to be made on the basis therein stated is affirmed and the decree of the District Court is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA *v.* SIMON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 168. Argued January 29, 1918.—Decided March 4, 1918.

The Navy Department accepted respondent's proposal to furnish certain sets of wireless telegraph appliances, the bid having been based on the Department's specification describing the appliances desired and upon a sample submitted with the bid as the Department required. Before the contract was completed this suit was brought to restrain him from making or delivering, upon the ground that petitioner's patent rights would thereby be infringed. In the courts below a decree dismissing the bill was made and affirmed upon the ground that the infringement, whether direct or contributory intrinsically, was not unlawful, in view of the Act of June 25, 1910, c. 423, 36 Stat. 851. *Held*, following *Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, *ante*, 28: (1) That, if the making of the appliances would be *per se* an infringement, the Act of June 25, 1910, construed in that case, afforded no defense; but (2) if, as contended and not decided in the courts below, the appliances as called for were so far incomplete that their making and furnishing would at most contribute to infringement by the Government in adjusting and using them for essential governmental purposes, the acts complained of would not be illegal or subject to injunction, in view of the statute as construed in the case cited and in *Crozier* v. *Krupp*, 224 U. S. 290. *Held*, further, (3) that, the nature of the infringement, i. e., whether it was direct or contributory—having been erroneously treated as irrelevant and so not decided by the courts below, the case should be remanded to the District Court for consideration and determination of the rights of the parties in the light of this court's construction of the statute, not overlooking petitioner's contentions that making the appliances for the Government before the contract was completed, and making them for persons other than the Government, would constitute direct infringements.

231 Fed. Rep. 1021, reversed.

THE case is stated in the opinion.

Mr. L. F. H. Betts and *Mr. John W. Griggs* for petitioner:

Prior to the Act of 1910, a patentee had a remedy in the Court of Claims by a suit against the United States for its lawful use of an invention, and a remedy in the Court of Claims or District Courts where his patented rights were taken under the exercise of the power of eminent domain. By a tortious or unlawful use of an invention, the United States does not acknowledge or concede that the patentee is entitled to the exclusive rights granted by a patent, or that the United States has appropriated or used any such rights. In fact, any such use of his exclusive rights is in effect a denial of the existence of such rights; or, at least, such use is treated by the United States as the exercise of its own rights. Consequently the patentee could not then recover upon the theory of a taking under the exercise of the right of eminent domain—which does not involve the commission of a tort—for which the law would imply a promise to pay reasonable compensation. But if the prerequisites to the taking of patent rights under eminent domain existed, the patentee could—in a suit in the Court of Claims or the District Court—recover compensation prior to the Act of 1910, on an implied promise to pay. *Hollister* v. *Benedict*, 113 U. S. 59, 67; *Brooks* v. *United States*, 39 Ct. Clms. 494; *Bethlehem Steel Co.* v. *United States*, 42 Ct. Clms. 365; *United States* v. *Russell*, 13 Wall. 623, 626; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *United States* v. *Lynah*, 188 U. S. 445, 463 *et seq.*

Prior to the act, a patentee had a remedy by an infringement suit against officers of the United States for personal profits and damages. Although it was held that officers could not be enjoined from the infringement when acting in their official capacity, where the infringement was being conducted at government plants or the infringing device was in the possession and use of the United States, yet these officers were liable for the infringement and to

account for such profits as they personally made and to pay such damages as they personally caused. *Cammeyer* v. *Newton*, 94 U. S. 225; *James* v. *Campbell*, 104 U. S. 356; *Belknap* v. *Schild*, 161 U. S. 10; *Forehand* v. *Porter*, 15 Fed. Rep. 256; *Head* v. *Porter*, 48 Fed. Rep. 481, 488, 489. These suits in equity, brought against officers of the United States for infringement of a patent, were not dismissed for lack of jurisdiction, but the court assumed jurisdiction and decided each case on its merits.

Prior to the act, a patentee had a remedy in equity for an injunction and accounting for infringement against vendors or contractors with the United States, but no remedy against the United States for the use by the United States without license or lawful right, *i. e.*, a tort or infringement of a patent.

The Act of 1910 is an enlarging and remedial statute by which the United States simply consents to be sued in tort for its infringement of certain patents. If it be held that the act gives the Government the power of appropriating patent licenses by virtue of eminent domain, the rights of owners of patents are further restricted, because one effect of the act then is that in all cases of suits against the Government for use of patented inventions, where no element of contract is present, the Government may attack the validity of the patent. This was not the case before the act, for patentees then had remedies against the Government in case of a taking under the power of eminent domain and such cases involved necessarily, to prevent their being actions for tort, the recognition of the patentee's rights. It seems clear that the act should be construed to apply only to cases of infringement by the Government as distinguished from cases of a taking under the power of eminent domain; and should not be construed to deprive this petitioner of its formerly existent right to an injunction against this respondent, and the recovery from him of damages and profits.

The District Court's contention sweeps away the distinction between the infringing private citizen and an infringing Government and its officers. It confuses the right of a patentee to enjoin such private infringer, and to recover compensation from him, even when acting with the Government, with the power in the chancellor to adjust his decree to what public necessity demands.

In the case at bar, the plaintiff had a right of action to recover damages and profits made by Simon as an independent manufacturer and seller to the Government, and also had an independent right of action, but no remedy, against the Government as a user of the infringing apparatus. *Birdsell* v. *Shaliol*, 112 U. S. 487; *Jennings* v. *Dolan*, 29 Fed. Rep. 861; *Daimler* v. *Conklin*, 170 Fed. Rep. 70. There being three distinct and independent rights, there are three distinct and independent remedies which a patentee has, to wit, the right to recover from the infringing manufacturer and vendee for profits and damages, and the distinct and independent right to recover against the user for damages and profits. It was on this latter principle that the courts, prior to the Act of 1910, took jurisdiction of a suit against an infringing contractor with the Government, and not because the Government had not consented to be sued. A contractor acting for his own profit and benefit has not the same relation to the Government as one of its officers or employees.

The District Court was in error in assuming that by calling for bids for wireless apparatus under the Navy specifications government officers appropriated a license under the patent. The specifications did not mention the invention of the patent in suit. The officers of the Navy might have been satisfied with unpatented apparatus or means. There is no dispute as to the power of the Government to exercise its inherent right of eminent domain over intangible patent rights. Congress, by the provisions (§ 120) of the National Defense Act, 39 Stat.

213, has practically provided for the exercise of that right in respect to manufactured munitions of war whether patented or not.

Crozier v. *Krupp*, 224 U. S. 290, decided that the Act of 1910 provided a remedy against the United States in tort for its direct infringement, but that its officers could not be enjoined from continuing such infringement.

The right to the injunction should have been sustained, notwithstanding the Act of 1910. The operation of the injunction, so far as the Government's interests were concerned, might have been suspended, if the facts warranted such suspension, but injunction could not be rightfully denied except in case of necessity or of immediate or impending danger to the Government. Even then, we submit, the relief should not have been denied unless the petitioner or its licensees were unable or unwilling to supply the necessary apparatus at a just and reasonable price, and, in any event, unless the petitioner was secured against loss by an indemnity bond from the respondent.

The act of the respondent in manufacturing the patented apparatus, before he had any contract with the United States and for his own benefit and profit, is a separate tort, independent of any subsequent sale to or later contract with the United States, and was sufficient basis to sustain the bill and for an order for an injunction. The respondent had no assurance when he infringed that he would secure the government contract.

The fact that the apparatus might be sold to others than the United States, or that the respondent might use it, was sufficient to justify an injunction.

Mr. Walter H. Pumphrey for respondent:

The sample set was designed and manufactured under the authority and at the request of the Navy Department, and in accordance with the Department's specifications, and use of the patent necessarily was involved in

complying with those specifications. *Brooks* v. *United States*, 39 Ct. Clms. 494.

There was a failure of proof of direct infringement. Manifestly, there can be no argument of infringement based upon the manufacture of the apparatus which Simon supplied to the Department—with nothing more. Therefore, petitioner is driven into the position that the Navy Department, in installing Simon's apparatus, adds certain things to it, which result in producing a system embodying the alleged invention of the Marconi claims in issue and which, therefore, infringes these claims. The manufacture of a separate element of a patented combination, unless proved to have been conducted for the purpose and with the intent of aiding infringement, is not in and of itself infringement. *Saxe* v. *Hammond*, 1 Banning & Arden, 629; *Heaton Co.* v. *Eureka Co.*, 77 Fed. Rep. 288; *Thomson-Houston Co.* v. *Ohio Brass Works*, 80 Fed. Rep. 712; *Bullock Co.* v. *Westinghouse Co.*, 129 Fed. Rep. 110. Therefore, in order to sustain the petitioner's contention as to contributory infringement, this court must view the Federal Government and this respondent as conspiring together, or acting in concert, the former as principal and the latter as an accomplice, to commit an unlawful act. Such a view is not possible under the Act of June 25, 1910, and the decisions in *Crozier* v. *Krupp*, 224 U. S. 290, and *International Curtis Marine Turbine Co.* v. *Cramp & Sons*, 211 Fed. Rep. 124–152. Under the act, as interpreted by this court, it is clear that the Federal Government had a lawful right to make and use patented inventions, subject to the obligation to make just compensation to the patent owner for the property so taken. Whatever may have been the character or quality of the act of the government officer with whom Simon negotiated, the completion and use by the Government of the apparatus in question was clearly an adoption by the United States of the act of the officers when and as committed, and caused such act to

become, in virtue of the statute, a rightful appropriation, for which compensation is provided.

The facts admitted and established conclusively show that the real defendant here is the United States. It was the Navy Department that decided upon and elected to use the apparatus, advertised and solicited bids for it, required each bidder to make and submit a sample set, designated and authorized the respondent, Simon, along with several others, to furnish certain parts of a wireless transmitting apparatus for examination and test, which parts are herein termed a sample set, added the essential elements necessary to make the incomplete and inoperative apparatus complete and operative for wireless transmission, and it was the Department's completion and use of the apparatus that brought it within the claims of the patent in suit, if it is so. The action should clearly have been brought against the Government in the Court of Claims. [Counsel went fully into the purpose of the Act of 1910, and its relation to the doctrine of eminent domain, and its supposed effect in creating a license in favor of the Government, bestowing much consideration upon the case of *Crozier* v. *Krupp*.]

Simon does not sell wireless telegraph apparatus to the Navy Department; he is merely a contractor, making and supplying it to the Department on its orders. He is, therefore, not a vendor of such apparatus. *Johnson Co.* v. *Union Co.*, 55 Fed. Rep. 488. Obviously, the license to the Government is unrestricted and protects those who do for the Government that which the Government has a right to do under the license. To hold that the license to the Government is a limited license to "use," in the narrow sense of the use of machines or apparatus, would defeat the very purpose this court, in *Crozier* v. *Krupp*, held the act was intended to serve, to wit, to avoid "interference with the right of the Government to make and use" inventions in the interest of the commonwealth.

Even if the word "use" be taken in the narrow sense, it is nevertheless well settled that the right to use an invention implies the right to make the same. The fact that the defendant may make a profit out of the making was not a violation of the petitioner's rights and the petitioner is not entitled to the profit of the manufacturer. The right to such profit passed with the license irrespective of the individual who might do the work.

Mr. Chief Justice White delivered the opinion of the court.

In the spring or early summer of 1915 the Navy Department submitted its call for proposals to furnish 25 wireless telegraph transmitting sets. The call contained a specification describing the apparatus desired and provided that no bid would be entertained unless the bidder in advance or at the time of his bid submitted a sample of the apparatus which he would furnish under his bid if accepted. Simon, the respondent, who had no manufacturing establishment, employed a manufacturer of electrical apparatus to make for him a wireless telegraph transmitting set and when it was made submitted it to the Navy Department in accordance with the call. He also submitted a bid to furnish the appliances called for conformably to the sample and his bid was accepted by the Navy Department in August, 1915. Before the contract, however, was formally completed, in September following, the Marconi Wireless Telegraph Company, the petitioner, as assignee of the Marconi patents on apparatus for wireless telegraphy, filed its bill against Simon seeking an injunction preventing him from making or delivering the apparatus described in his bid on the ground that his doing so would be an infringement of the rights secured by the Marconi patents. The complainant moved for a preliminary injunction in accordance with the prayer of the bill, supporting its motion by affidavits, and the

defendant made a counter motion to dismiss the bill, the motion not being in the record but the ground thereof being persuasively shown by an affidavit submitted in its support, as well as by the reasons given by the court when it came to pass upon the motion. The ground stated in the affidavit was as follows:

"That affiant, in supplying the United States Navy with wireless sets constructed in accordance with Navy Specifications in the present instance for use on submarines, understood that he would be free of any and all liability for profits and damages for alleged infringement of patents, in view of the law as established by many recent decisions of the United States Courts holding that the Government, in the exercise of the right of eminent domain, may impose a license on any patent, the subject-matter of which it elects to use, and if the apparatus supplied by affiant to the Navy comes within the claims of the patent in suit, affiant has only assisted the Government, a licensee, in carrying out its license."

On the hearing of the motions there was contention as to whether the transmitting sets furnished by Simon were merely an indirect or contributory infringement of the Marconi patents because they were not complete and could not become so until they were adjusted for use and used by the Navy Department, or whether they were so complete without reference to such subsequent adjustment and use as to be a direct infringement. In passing at the same time upon the motion for injunction and the motion to dismiss the bill, the court, not doubting that the bill and the affidavits supporting the motion for an injunction established that the making and furnishing of the apparatus by Simon in an abstract sense infringed the Marconi patents either directly or indirectly by contribution, did not find it necessary to determine which one of the two characters of infringement had resulted because it concluded that such determination in the con-

crete was wholly irrelevant, as, under the view taken of the case, in any aspect there was no unlawful infringement. This conclusion was reached by considering the Act of June 25, 1910, c. 423, 36 Stat. 851, in connection with the decision in *Crozier* v. *Krupp*, 224 U. S. 290, and by holding that from such considerations it resulted that there existed in favor of the United States a general license to use patent rights when necessary for its governmental purposes and that Simon, as a contractor or one proposing to contract with the United States, could avail himself of the license right in favor of the United States and therefore was entitled to make and deliver the articles in question for the United States although if such license had not existed, the doing so would be either a direct or contributory infringement. The order as to both the injunction and the motion to dismiss were as follows:

"No injunction will issue. The motion to dismiss is granted, unless plaintiff elects in twenty days to plead over, and allege infringements not arising from governmental contracts. If such election is made, defendant to answer in twenty days after amended bill filed." (227 Fed. Rep. 906.)

The complainant having refused to make the election and to amend, a decree of dismissal was subsequently entered which was reviewed by the court below. That court, while it affirmed upon the theory of the license resulting from the Act of 1910 in accordance with the views which had been expressed by the trial court, also treated the act of Simon as either an infringement *per se* or a contribution to the infringement, if any, resulting from the acts of the United States, and did not distinguish between them doubtless because of a belief that under the construction given to the Act of 1910 both were negligible and afforded no ground for complaint. (231 Fed. Rep. 1021.) By virtue of the allowance of a writ of certiorari the case is now before us.

In view of the construction which we have given the Act of 1910 in the case of *William Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, just decided, *ante*, 28, it is apparent that both the courts below erred, since the significance which they gave to the statute, and upon which their conclusions were based, we have held in the case stated to be without foundation. It would hence follow, looking at this case from a generic point of view, that our duty would be to reverse the action of both courts below and to decide the controversy on the merits in the light of the construction of the statute which we have announced. But we are of opinion that under the case as made by the record the duty of applying to the issues the true meaning of the statute cannot with safety or with due regard to the rights of the parties be now performed, because of the failure of the courts below (a failure obviously resulting from the mistaken view they took of the statute) to determine whether the acts of Simon in furnishing the wireless apparatus amounted to an intrinsic or *per se* infringement, or only constituted contributions to the infringement, if any, resulting from the adjustment and use of the apparatus by the United States for its essential governmental purposes. We are compelled to this conclusion because, if the making of the parts was in and of itself an infringement, it is clear under the ruling which we have just made in the *Cramp Case* that Simon was not protected by the supposition of a license resulting from the Act of 1910 and that his acts were none the less wrongful because committed in the course of the performance of a contract with the United States. And if, on the other hand, they were only contributions to an infringement resulting from the acts of the United States, it is equally clear that, in view of the provisions of the Act of 1910 as interpreted in the *Cramp Case* and as upheld and applied in the *Crozier Case*, no illegal interference with the rights of the patentee arose or could arise

from the mere furnishing to the Government of the United States of the parts which were not *per se* infringements, even although the use by the United States would infringe the patents.

It follows therefore that to finally decide the case would require us to determine whether or not the apparatus as furnished was a direct infringement or mere contribution. But to do this would call for the exercise on our part of a duty which it was the province of the court below to perform and which doubtless it would have performed but for the error into which it fell concerning the interpretation of the Act of 1910 and the application to the subject which was before it of the prior decision of this court in *Crozier* v. *Krupp, supra.* Under these circumstances, as we have clearly removed by our decision in the *Cramp Case* all reasons for misconception concerning the statute and have thus cleared the way for the discharge by the court below of its duty, we think the case before us comes directly within the spirit of the ruling in *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257; *United States* v. *Rimer,* 220 U. S. 547; *William Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.,* 228 U. S. 645; *Brown* v. *Fletcher,* 237 U. S. 583. We do not overlook, in saying this, contentions advanced in argument that, as the devices may have been made by Simon not only for the Government but for other persons, and even those furnished the Government were made before the contract with the Navy Department was completed, therefore his act in making them was a direct infringement. We do not, however, stop to dispose of them, since we are of opinion that under the state of the record we ought not to do so but should leave them also to be considered for what they are worth by the court below, if duly presented and relied upon, when it comes hereafter to consider the controversy.

Our order therefore will be one reversing the decrees of

both courts below and remanding to the District Court to the end that in the light of the construction which we have given the Act of 1910 the rights of the parties may be considered and determined.

Reversed and remanded.

MR. JUSTICE MCKENNA dissents.

GULF, COLORADO & SANTA FE RAILWAY COMPANY *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 158. Argued January 25, 1918.—Decided March 4, 1918.

An order of a state commission requiring the stopping of certain interstate trains for reception and discharge of passengers at a county seat of only 1500 population, *upheld*, in view of a statute, not directed adversely at interstate trains, but specifying the train service to be supplied to all county seats and evidencing a legislative estimate (not here confuted) of county seat needs.

Serious doubt is expressed as to whether the order could be sustained, from the standpoint of the local requirements of the population merely, viz: as meeting a need for sleeping car service and as an accommodation to passengers using the trains in question to reach the city.

The need of making fast time in competition with other railroads and in carrying the mail, *held*, not in this case to render the order unduly burdensome to interstate commerce, it appearing that the required stops would consume but a few minutes each, that stops are made voluntarily at all other county seats and some smaller places, and that there is a detour in the routing.

Power in a state commission to order stops by interstate trains, not resulting in direct burden on interstate commerce, in pursuance of a statute not aimed at such trains but specifying train service

required at county seats, may coexist with the duty imposed on carriers respecting regulations for transportation facilities by the Hepburn Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584, and the Act of June 18, 1910, c. 309, § 7, 36 Stat. 546, and the jurisdiction of the Interstate Commerce Commission over such matters, if the order is not in conflict with regulations of the latter Commission.

A railroad company which does not avail itself of an opportunity given by the state law to test the validity of an order of a state commission in the state or federal court, cannot be relieved from a cumulation of penalties due to its violations of the order while awaiting proceedings by the State.

169 S. W. Rep. 385, affirmed.

THE case is stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. J. W. Terry, Mr. A. H. Culwell* and *Mr. Robert Dunlap* were on the briefs, for plaintiff in error.

Mr. B. F. Looney, Attorney General of the State of Texas, and *Mr. Luther Nickels,* Assistant Attorney General of the State of Texas, for defendant in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the State to compel the defendant railroad, the plaintiff in error, to stop two interstate trains, one numbered 17 and southbound, the other numbered 18 and northbound, at the City of Meridian, for a time sufficient to receive and let off passengers. Meridian is the County Seat of Bosque County and has a population of 1500. Two other trains of the defendant going each way stopped there daily, but the Railroad Commission of the Sate found that these were insufficient for the needs of business at that station and made the order that this suit

seeks to have carried out. The statute of Texas giving to the Commission power to make such order contains a proviso that "four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations"—so that the Commission seems to have obeyed a statutory mandate. Art. 6676, (2), Vernon's Sayles' Texas Civil Statutes. Another article, 6672, imposes a penalty of not more than $5,000 for every failure to obey such lawful order, and this suit seeks to recover penalties as well. The trial Court confirmed the finding of the Commission that the present service is insufficient, and the order, and imposed a fine of $22,400, being $100 for each failure to stop. It stated the facts in great detail but it will not be necessary to repeat them here. The Court of Civil Appeals again confirmed the above finding and affirmed the judgment. The Supreme Court of the State refused to allow a writ of error, declaring itself unable to say that the conclusion of the lower Court was unwarranted as matter of law.

This case does not require quite so critical an examination into the facts as was made in *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335, 344, 345, and *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 330, 334, 335, in order to decide whether the judgment of the State Courts and Commission and, it would seem, of the legislature, was wrong. If the reasoning that prevailed with the Court of Civil Appeals were applied to Meridian simply in view of the number of its inhabitants there would be a serious question whether it could be sustained. For the consideration most emphasized was that no sleeping cars were attached to the local trains and that in order to make use of such accommodation on the trains in question passengers had to get in or out at stations from seven or eight to twelve or fifteen miles away. It was thought that when the railroad fur-

nished such accommodations to a part of the public it was bound to furnish the same to all others—a very questionable proposition as applied. The other fact relied upon was that passengers not infrequently came on trains 17 and 18 destined for Meridian and had to get out at Morgan or Clifton, the next stations to the north and south. We repeat that whether these facts would justify an intermeddling with interstate trains in favor of a place of this size, merely as such, would be a serious question. But the State Court sustained the order as one required by statute in favor of county seats, up to the number of four trains each way, Sundays excepted. The law is not directed adversely at interstate trains, but expresses the specific judgment of the legislature as to the needs of the county seats, all of which, of course, it knew. If its judgment is correct, which we have no grounds for denying, the order may be justified, so far as its interference with interstate commerce is concerned, unless some other fact shows that the burden is too great.

The only additional facts material to this point are that the defendant competes with railroads having shorter routes, that for that reason and in order to keep its contracts for the carriage of United States mails it has to make fast time—and that it has little or none to spare. On the other hand Meridian is the only county seat at which it does not stop, and it does stop at some smaller places, as well as make a detour in order to go through Houston. The time that would be taken would be four or five minutes for Number 17, and about 10 minutes for Number 18, according to the trial Court. The Court of Civil Appeals says in general terms from three to five. We are not prepared to say that the finding that there will be no unreasonable burden is wrong.

It is urged that the power of the State Commission has been taken away by the Hepburn Amendment to the Act to Regulate Commerce, of June 29, 1906, c. 3591, § 1, 34

Stat. 584, and the further Act of June 18, 1910, c. 309, § 7, 36 Stat. 546, making it the duty of carriers, including sleeping car companies, to make reasonable regulations affecting the facilities for transportation, the Interstate Commerce Commission having jurisdiction over such matters. But the State requires certain services to county seats with an aim that is not directed against interstate trains as such. The statute is subordinate to the regulations of the Commission so far as it may lead to an incidental interference with such trains and in the absence of any conflict it may stand as here applied. See *Chicago, Burlington & Quincy R. R. Co.* v. *Railroad Commission of Wisconsin*, 237 U. S. 220, 233.

The other point argued here is that the railroad could not be subjected to, at most, more than one penalty while the validity of the order was awaiting judicial determination, *Ex parte Young*, 209 U. S. 123, 147, being relied upon. But the statutes of Texas provided for a suit to test the validity of the order, in a court either of the State or of the United States, Art. 6657. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, 392. *Railroad Commission of Texas* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 51 Tex. Civ. App. 447. *Eastern Texas R. R. Co.* v. *Railroad Commission*, 242 Fed. Rep. 300. The railroad company saw fit to await proceedings against it, and although the case in all its aspects is somewhat extreme the judgment must be affirmed. *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 669.

Judgment affirmed.

The Chief Justice, Mr. Justice McKenna and Mr. Justice McReynolds dissent.

MUNICIPAL SECURITIES CORPORATION *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 56. Argued November 15, 16, 1917.—Decided March 4, 1918.

If the decision of the state court rests upon a ground of general law adequate to support it, independently of the decision upon alleged violation of federal right, the case is not reviewable here.

So *held*, where the plaintiff, as assignee of special tax bills issued by a city in payment for sewer construction, claimed that, by appropriating a certain lot in the sewer district through condemnation proceedings and by thus preventing the lien of the tax bills from attaching thereto, the city took property without due process and so rendered itself liable, whereas the state court, construing the sewer contract, the city ordinance and charter and state constitution and laws, held that there could be no recovery against the city on the tax bills themselves, and that the cause of action, if any, for the alleged wrongful taking, was a separate matter not covered by the assignment.

Writ of error to review 265 Missouri, 252, dismissed.

THE case is stated in the opinion.

Mr. William C. Scarritt, with whom *Mr. Elliott H. Jones* and *Mr. Charles M. Miller* were on the briefs, for plaintiff in error.

Mr. A. F. Smith, with whom *Mr. J. A. Harzfeld* and *Mr. Jay M. Lee* were on the briefs, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The plaintiff in error brought suit in the Circuit Court of Jackson County, Missouri, to recover on certain tax bills issued to one Michael Walsh, its assignor, for the

construction of a sewer in Kansas City, Missouri. The case was tried on an amended petition and answer. The amended petition was filed on May, 20, 1909, but it is said the suit was begun on May 29, 1906. The amended petition set out that by an ordinance approved January 24, 1901, Kansas City provided a sewer district, and let a contract for the construction of the sewer to Walsh. That Walsh constructed the sewer, and was paid for the work by special tax bills against sewer district number 146 in Kansas City. That Lot one, Block one, C. H. Pratt's Vine Street Addition, is located in said sewer district, and that at the time the work was done and the tax bills issued the owner of said property held the same subject to certain proceedings to condemn said lot for a public parkway in the South Park District of Kansas City established by an ordinance approved October 3, 1899; that said parkway ordinance ordered that said Lot one, Block one and other property should be condemned for the purpose of a public parkway, and proceedings were begun in the Circuit Court of Jackson County, Missouri, for the condemnation of the lot for that purpose; that the condemnation proceedings were carried to judgment in the Circuit Court of Jackson County, Missouri, wherein a verdict had been rendered for the value of the property on June 4, 1901, that the verdict was duly affirmed, and judgment rendered on September 14, 1901, in the Circuit Court. Upon appeal to the Supreme Court of Missouri said judgment was suspended until affirmed by the Supreme Court, June 4, 1902, and that after that date the city paid for and took possession of said Lot one, Block one, Pratt's Vine Street Addition, and now is holding the same for a public park. Plaintiff further alleges that, while the condemnation proceedings were pending in the Supreme Court, Walsh completed the work, and that tax bills therefor were issued to him on March 15, 1902, chargeable in payment of the appropriate share of the cost of the sewer upon the lot above

described. The plaintiff alleges that Walsh sold and assigned the certificates or special tax bills to it; that by reason of the condemnation proceedings and the judgment therein the tax bill never became a lien upon the lot, above described, and that upon a final determination of said condemnation case Kansas City was liable to pay the amount of said tax bill with interest, and that the city cannot by an act of itself, not consented to by the plaintiff, either by judicial proceedings in the nature of condemnation or otherwise, destroy plaintiff's right to collect the cost of the said work in accordance with the contract mentioned; the plaintiff invokes the Fourteenth Amendment of the Constitution of the United States guaranteeing the protection of its property by due process of law as against the acts of States. Plaintiff alleges that before the beginning of the suit it offered to surrender to the Board of Public Works of Kansas City the tax bills issued as aforesaid, and to accept a certificate as provided in the city charter in lieu thereof, if the Board should hold that the said certificates or tax bills were not certificates conformable to the provisions of the charter of Kansas City, but the Board refused to accept the same or to issue a new certificate, and denied all liability for the said charge.

The city answered the amended petition, and stated therein that on March 15, 1902, it did issue special tax bills to Michael Walsh as set out in the petition; and that Walsh on March 15, 1902, executed and delivered to Kansas City a full and complete release on account of any claim arising on said tax bills as provided in § 16, Article 9, of the charter of Kansas City. The answer further sets up that the charter of Kansas City provides a method by which the city shall pay its share of any public improvement on land owned in fee by it; that no certificate was issued by the city on the lot in question or any other lots described in the petition; and that it was not found that the lots mentioned in the petition were owned in fee sim-

ple by the city; that there was no compliance with the charter of the city, and no obligation created thereunder.

At the trial the tax bills sued upon were introduced, indorsed as follows: "Assignment. For value received —— assign this Special Tax Bill and the lien thereof to Municipal Securities Corporation, and —— authorize to sign — name — to the receipt. Michael Walsh."

The record does not disclose when this assignment was made, and it bears no date.

Upon trial in the Circuit Court the court held as a matter of law that Kansas City was an agency of the State of Missouri, and had by its official acts, ordinances and conduct appropriated to the public use the property and property rights of the plaintiff consisting of valid and subsisting liens upon certain real estate without making just compensation, or any compensation therefor, and thereby deprived the plaintiff of its property without due process of law contrary to the Fourteenth Amendment and contrary to the bill of rights of the State of Missouri, and rendered judgment for the plaintiff.

The case being taken to the Supreme Court of Missouri the judgment of the Circuit Court was reversed (265 Missouri, 252), and the case was brought to this court because of an alleged violation of the protection afforded by the Fourteenth Amendment as the result of the alleged wrongful appropriation of the plaintiff's property. The Supreme Court of Missouri after reciting the facts, held that the suit was upon the tax bills, that as Walsh's agreement with the city and the ordinance itself provided that the city should not be liable to pay for the work or any part thereof otherwise than by the issue of special tax bills, and because the charter of the city provided that the city should in no event or in any manner be liable for or on account of the work done in constructing the sewer, but that the work should be paid for in special tax bills which would be a lien on the property described in them,

and that under the Constitution of Missouri and the statutes of that State the use of municipal funds in the payment of tax bills was absolutely forbidden, there could be no recovery upon them, and in so far as recovery was sought because of the asserted conversion or destruction of the lien of the tax bills, the judgment for the plaintiff could not stand. Concerning this feature of the case the court said:

"The suit here is upon a tax bill in some aspects and upon a tort as for conversion in others. The petition is *sui generis*, being possibly what is meant by learned counsel for plaintiff when they say of it in their brief that it is 'typical in form.'

"We need not consider whether a recovery could have been had upon tort, as for the alleged conversion, or destruction, of the property upon which ordinarily the lien of the tax bills would have been fixed. *The assignment is not of the tort, nor of the contract, nor of the right to recover upon a quantum meruit, but of the tax bill pure and simple,* for it says: 'For value received —— *assign this special tax bill and the lien thereof* to Municipal Securities Corporation,' etc. The lien assigned was upon the lots and not against defendant; but the law is fairly well settled that the title of the city to these lots for use as a street attached by relation back under the facts here to the date of the judgment confirming the verdict of the jury, to-wit, September 14, 1901, a date long prior to the issuing of the tax bills, which were issued March 15, 1902. (*In re Paseo*, 78 Mo. App. 518.) The best that can be said for plaintiff's insistence touching this lien is that the lien of the tax bills attached conditionally to these lots; the condition of attachment being that the defendant would dismiss its condemnation case short of final judgment and payment of the money into court, as under the general law, absent a charter provision forbidding, it had the right to do. (*State ex rel.* v. *Fort*, 180 Missouri, 97; *Rail-*

road v. *Second Street Imp. Co.*, 256 Missouri, l. c. 407.) The city did not so dismiss the proceeding and the right of the city, temporarily suspended, as we may express it, by the appeal, attached upon the affirmance here of the judgment of condemnation as of the date of such judgment (*In re Paseo, supra*), and had the effect to convert these lots of private persons into integral parts of the highway, or street system of Kansas City, and to take them out of the category of property of private persons upon which liens of tax bills would attach; but since these lots became parts of public highways the judgment condemning them did not have the effect of converting them into that class of city property, the sewering of which created a liability against the city for which certificates evidencing such liability against the city were issuable by charter. (Sec. 14, Art. 9, Charter of Kansas City, 1898.)

"If Walsh himself had sued for the tort of conversion alleged in effect by the briefs and contentions of counsel for plaintiff, a different and much more serious question would confront us; but it seems idle to insist that upon the petition here and upon the assignment above quoted, that plaintiff may recover upon the theory of tort. We have seen already how futile and idle is the view that plaintiff may recover upon contract. Moreover, no such tort is assigned. Nothing is assigned but the tax bill and the lien thereof. . . . But be this as may be, the point of peculiarity in the instant case that plaintiff cannot in any event recover upon any theory of contract, but that it must recover, if at all, upon the theory of liquidated compensation for a tort, which tort was not assigned to it and on which it does not sue, destroys in our view any helpful analogy between the above cases from other jurisdictions and this one at bar."

As the matter above extracted from the opinion of the Supreme Court of Missouri shows, that court held the

action to be on the assigned tax bills, and that if Walsh might have maintained a suit because of the wrongful taking of the property as alleged, nothing was assigned to the plaintiff in error but the tax bills and the lien thereof; and that the plaintiff could not maintain this action as one in tort because it did not appear to be the assignee of such right of action if one existed. It therefore follows that the Missouri Supreme Court rested its decision upon a ground of general law adequate to support it, independently of the decision upon alleged violation of federal right under the Fourteenth Amendment. In that situation it is well settled that a case from a state court is not reviewable here. *Wood* v. *Chesborough*, 228 U. S. 672; *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596; *Giles* v. *Teasley*, 193 U. S. 146.

It follows that the writ of error must be dismissed for want of jurisdiction, and it is

So ordered.

KRUEGER *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 111. Submitted December 20, 1917.—Decided March 4, 1918.

Land, part of an odd-numbered section within the primary limits, but covered by a valid preëmption filing at the date of the definite location of the right of way, was excepted from the grant made to the Denver Pacific Railway & Telegraph Company by the Acts of July 1, 1862, c. 120, 12 Stat. 489; and March 3, 1869, c. 127, 15 Stat. 324. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629.

Upon the facts as found, *held*, that one who under a deed of the Denver Pacific Railway & Telegraph Company and through mesne con-

veyances came into, and retained, possession of a parcel of land, which, because of a preëmption filing, was excepted from the grant made to that company (*supra*), was in a position to acquire full title by purchase under the Adjustment Act of March 3, 1887, c. 376, 24 Stat. 556, § 5; and the regulations of the Land Department relative thereto.

One who purchases under a receiver's receipt, issued upon a soldiers' additional homestead entry, land, which is in the actual possession of another claiming from another source under recorded deeds, is constructively notified by such possession and records of that other's claim and of that other's rights as so revealed; and also—through the receiver's receipt—of the origin of his own title and therein of the fact that it was procured by means of affidavits falsely stating that the land was unoccupied, unimproved and unappropriated.

The defense of *bona fide* purchase is affirmative; the burden of establishing it rests upon the party who makes it, in a suit by the United States to cancel a patent for fraud.

228 Fed. Rep. 97, affirmed.

THE case is stated in the opinion.

Mr. William V. Hodges and *Mr. Richard B. Scandrett, Jr.*, for appellant:

A purchaser under a patent is not required to go behind the patent. *United States* v. *Laam*, 149 Fed. Rep. 581. Mrs. Krueger was not bound to hunt for grounds of doubt, and in order to set the patent aside the United States must charge her with notice of the original fraud. *United States* v. *Detroit Timber & Lumber Co.*, 131 Fed. Rep. 668; *United States* v. *Clark*, 200 U. S. 601, 607, 609. If Benson or his tenants were actually in possession of the land at the time of the purchase by Mrs. Krueger, it may be conceded that she is chargeable with notice of such possession, but there is nothing in that circumstance or any inquiry which might be induced thereby, which would give her notice of the alleged fraud upon the United States. Such possession was only notice to Mrs. Krueger of the extent and character of the claim of the possessor himself, not of defects in the title of her predecessor in title. *Suiter*

v. *Turner*, 10 Iowa, 517, 524; 2 Minor, Real Property, § 1413; 2 Pomeroy Eq. Jur., § 615. This rule of law implying notice from an adverse possession was invented in order to protect tenants of a grantor who conveyed property without actually informing the grantees of the leases, or to protect owners of property who had failed to register their deeds. In the case of possession adverse to a grantor, such possession only charges the grantee with knowledge similar to that which he would have had if the adverse possessor had not neglected to register his title. Any right which Benson had was certainly not derived through or from Mrs. Krueger's grantor, and it is submitted that actual notice of Benson's title is of no materiality, for the simple reason that he had no valid title to record. *Burt* v. *Baldwin*, 8 Nebraska, 487, 494; *Roll* v. *Rea*, 50 N. J. L. 264; *Munn* v. *Bergess*, 70 Illinois, 604, 614, 615; *Lloyds* v. *Karnes*, 45 Illinois, 62, 72. She was justified in assuming that the duly executed instrument of the United States was valid, and, since she was an innocent purchaser of such patent for a valuable consideration, the voidable title in the hands of her predecessors becomes absolute in her. *Perkins* v. *Hays*, 1 Cooke (Tenn.), 163, 168, 174; *Phillips* v. *Buchanan Lumber Co.*, 151 N. Car. 519. The most notice that knowledge of any possession by Benson could impute to Mrs. Krueger would be of the facts or circumstances that she might have learned by making inquiry of Benson. *Losey* v. *Simpson*, 11 N. J. Eq. 246, 255; *Runyan* v. *Snyder*, 45 Colorado, 156, 162. So far as she could have learned by inquiry, he was a trespasser and had no rights whatever, and there is no evidence to show that Benson knew that a fraudulent affidavit had been made at the time Mrs. Krueger purchased the land.

The matter to be determined is whether the legal title should remain in Mrs. Krueger, or the patent be canceled and title restored to the United States—not whether the

legal title should go to a third party. To accomplish this result, the Government must establish the fraud by clear and convincing proof. It must be conceded that she had no actual knowledge of the fraud, and there is nothing in the record to indicate that the most diligent inquiries made to Benson himself would have divulged the fact that the patent had been procured by means of false affidavits.

Since there is nothing in the record to show that Langston, the purchaser from the railroad company, was a citizen of the United States, or had declared his intention to become such, or was a *bona fide* purchaser, as provided by § 5 of the Act of March 3, 1887, 24 Stat. 556, the record of Benson's title and his occupancy did not charge Mrs. Krueger with constructive notice of any right of Benson, because the absence of those circumstances prevents Benson from having any valid interest in the said land. *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 362; *Miller* v. *Tacoma Land Co.*, 29 L. D. 633, 634; *Gertgens* v. *O'Connor*, 191 U. S. 237, 241. It is not disputed that the deed from the railroad to Langston was made on April 5, 1871, at a time when the Woodward filing was valid, and at that time the railroad had no right, title or interest in the land. To be a *bona fide* purchaser within the purview of the act, it is necessary that the purchaser acquire the lands at a time when they are "public lands in the statutory sense and free from individual or other claims." *United States* v. *Winona R. R. Co.*, 165 U. S. 463, 481.

The original affidavits to the effect that the land was not already occupied in reliance upon which the patent was issued were not false, because a mere trespasser is not an "adverse occupant" within the meaning of the Land Office requirement.

Mr. Assistant Attorney General Kearful for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing a decree of the District Court of Colorado which dismissed a bill of complaint filed by the United States against Emma T. Krueger for the cancellation of a certain patent upon public lands in Colorado.

The Government alleged in its bill that the land, eighty acres, patented to William E. Moses June 6, 1910, upon a soldiers' additional homestead entry (Rev. Stats., §§ 2306, 2307; 28 Stat. 397), had been secured by means of false affidavits, one by the entryman, Moses, who had made oath that the land was unoccupied, unimproved, and unappropriated by any person other than himself; the other by John A. McIntyre that the land was not in any manner occupied adversely to the selector, whereas in truth and in fact the land had been for several years previously in the open and notorious possession of one P. C. Benson under title deraigned from the Denver Pacific Railway & Telegraph Company under a land grant of Congress made July 1, 1862. It was also charged that the fraud was perpetrated by agreement between Moses, the entryman, and one C. M. Krueger, the husband of the defendant, Emma T. Krueger. It is charged in the bill that Mrs. Krueger took the conveyance through Moses and her husband with notice of the fraud and without consideration.

Upon issue joined, and the allegation of the answer that the defendant was a purchaser in good faith without notice of any fraud, the District Court found that the patent had been obtained by fraud, but that Mrs. Krueger was a *bona fide* purchaser without notice, and as such entitled to hold the land. The Court of Appeals took the same view of the evidence as to the fraudulent manner in which the land was acquired, and reached the conclu-

sion that the patent should be set aside for fraud committed against the United States unless the defendant had shown that she was an innocent purchaser without notice.

With some hesitation the Circuit Court of Appeals reached the conclusion that Mrs. Krueger at the time she purchased the land must be held to have had constructive notice of facts which, if investigated, would have led her to the knowledge of the fraud, and that she was not entitled as a *bona fide* purchaser to hold the land as against the Government. (228 Fed. Rep. 97.)

It was stipulated by the parties for the purposes of the trial as follows:

"By Act of Congress of July 2, [1] 1862 (12 Stat. 489), Congress granted to the Leavenworth, Pawnee and Western Railroad Company, a right of way over certain public lands, and also certain public lands to aid in the construction of said railroad. That under and by virtue of a certain Act of Congress of March 3, 1869, the Denver Pacific Railway and Telegraph Company became the owner of and entitled to all the rights and benefits so granted and conferred by said Act of Congress of July 2, [1] 1862, and said company selected and definitely located its said right of way, on August 20, 1869, and so selected and definitely located and fixed its said right of way as to bring the lands involved in this suit within the primary limits of said grant. On April 13, 1866, Robert W. Woodward filed a certain valid pre-emption declaratory statement, numbered 2094, as provided for in the Act of Congress dated September 4, 1841 (5 Stat. 455), for the lands hereinabove described (unoffered lands), upon which final proof and payment was never made, that said declaratory statement was a valid and subsisting claim on August 20, 1869, and all rights under and by virtue of said pre-emption filing of said Woodward expired by operation of law on July 14, 1872, up to which date said filing was a valid and subsisting filing."

The land was part of one of the odd-numbered sections named in the land grant and was opposite the constructed part of the road. April 5, 1871, the Denver Pacific Railway & Telegraph Company sold and conveyed the land to one James Langston. Thence by mesne conveyances the land passed to Perry C. Benson, April 6, 1904.

The pendency of Woodward's filing prevented the title from vesting in the railroad company, for it caused the land to be excepted from the grant. *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629.

A copy of the abstract of title showing the chain of title from the Denver Pacific Railway & Telegraph Company to Perry C. Benson was stipulated into the record; the abstract also showing the chain of title to and including the purchase by Mrs. Krueger of one-half interest in the land from C. M. Krueger.

Benson paid $1,375.00 for the land, and both courts found that he was and continued to be in possession of the land with the title of record as stated, and that Mrs. Krueger would be held to have knowledge of his rights, certainly as between herself and Benson. We have no doubt from the facts found that Benson had such possession and occupation of the premises as gave at least constructive notice of the nature and extent of his title. Under the Act of March 3, 1887, 24 Stat. 556, § 5, and the regulations of the Land Department, he would have been entitled upon hearing in the Department to purchase the lands and acquire full title thereto upon complying with the statute. Section 5 of the act, and the regulations of the Land Department are given in the margin.[1]

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[1] Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any

The turning question in the case is: Was Mrs. Krueger a *bona fide* purchaser in such sense that she can hold the land notwithstanding the fraudulent manner in which it was acquired by the entryman Moses for the benefit of Krueger. That Krueger had actual knowledge of Benson's claim to the premises admits of no doubt. As early as August 3, 1907, Krueger wrote to Benson:

"Upon a search of the records, I find that you are the present owner of the W/2NE/4, Sec. 17, Tp. 5 N, R 69 West of the 6th P. M. [the tract in controversy], and that the title thereto is imperfect. If you are sufficiently interested, I would be pleased to correspond with you relative to the matter and assist you in curing the defect.

"My charges will be reasonable."

Krueger had been chief clerk of the United States Land Office at Denver until February 12, 1907, and thereafter practiced as an attorney in land and mining matters at Denver. Moses procured the soldier's additional homestead right upon which the entry was made, and made the entry at the request of Krueger who had bought the soldiers' additional right from Moses for $780.00. Moses deeded the land to Krueger, and never claimed any interest in it. The Land Department's regulations required

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reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.

Regulations promulgated by the Land Department on February 13, 1889, provided with reference to § 5 (8 L. D. 348, 352):

"No entry will be allowed under this section until it shall have been finally determined by this Department that the land was excepted from the grant."

And again on August 30, 1890 (11 L. D. 229):

"If the applicant is not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor or the intervening purchasers may have been."

an affidavit that the land located or selected was not in any manner occupied adversely to the locator or selector. Moses obtained a receiver's receipt upon April 8, 1910; and conveyed by deed to Krueger April 15, 1910. On April 22, 1910, Krueger conveyed to Mrs. Krueger and Mrs. McIntyre, the wife of one who had made a corroborating affidavit also containing the statement that the land was not in any manner occupied adversely to the selector. The patent was issued to Moses June 6, 1910, and on April 22, 1913, Mrs. McIntyre conveyed her one-half interest in the premises to Mrs. Krueger. Mrs. Krueger testified that she paid her husband $400.00 in cash for the undivided one-half interest, and that she paid Mrs. McIntyre $1,500.00 by check for her one-half interest. She testifies that when she bought from her husband after final receipt, and before the patent issued, she had not seen the land and knew nothing about it, and did not in fact see it until March 27, 1913; that she knew nothing about the statements made in the affidavit signed by Moses or the affidavit of McIntyre; that before she purchased the interest of Mrs. McIntyre she had been upon the land and found there a Mrs. Benson, who said that her father-in-law was P. C. Benson, and that she and her husband were farming the land.

But we need not dwell upon any inferences which may arise from the relationship between Mrs. Krueger and her husband and her actual knowledge of Benson's possession, for we think the Circuit Court of Appeals was right in reaching the conclusion that Mrs. Krueger had at least constructive notice of the manner in which the land had been obtained from the Government. If the affidavit of Moses had truthfully stated the possession of Benson, Benson would have had an opportunity to claim his rights under the Act of March 3, 1887, and the regulations of the Land Department. From the receiver's receipt, which was the evidence of title of record when

Mrs. Krueger obtained the deed from her husband, she was bound to know that the land had been obtained upon an affidavit of Moses asserting that the land was not occupied adversely. Under the decisions of this court she was chargeable with notice from Benson's possession, and his record title from the railroad company, that he had a preferential right of purchase under the Act of March 3, 1887. *Gertgens* v. *O'Connor*, 191 U. S. 237, 246; *Ramsey* v. *Tacoma Land Co.*, 196 U. S. 360, 364. Having such notice of the origin of the title under which she had purchased, she was chargeable with notice of the facts shown by the records, and could not shut her eyes to these sources of information and still be an innocent purchaser without notice. This doctrine, often asserted in this court, was summarized in *Ochoa* v. *Hernandez*, 230 U. S. 139, 164, in which it was said: "It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. *Brush* v. *Ware*, 15 Pet. 93, 111; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437; *Northwestern Bank* v. *Freeman*, 171 U. S. 620, 629; *Mitchell* v. *D'Olier*, 68 N. J. Law (39 Vr.), 375, 384; 53 Atl. Rep. 467; 59 L. R. A. 949."

If Mrs. Krueger had used these sources of information she would have ascertained that the Moses affidavit wherein it was stated that the lands were not in any manner occupied adversely was untrue. Constructively she is held to have knowledge of these facts. *Washington Securities Co.* v. *United States*, 234 U. S. 76, 79. And see *Dallemand* v. *Mannon*, 4 Colo. App. 262, 264. The defense of *bona fide* purchaser is an affirmative one, and the burden was upon Mrs. Krueger to establish it in order to defeat the right of the Government to have a cancellation of the patent, fraudulently obtained. *Wright-Blodgett*

Co. v. *United States*, 236 U. S. 397, 403, 404; *Great Northern Ry. Co.* v. *Hower*, 236 U. S. 702.

We agree with the Circuit Court of Appeals that Mrs. Krueger did not sustain the burden of showing that she was a *bona fide* purchaser for value, and under the circumstances shown she had constructive notice of the manner in which the land had been procured from the United States. The Circuit Court of Appeals did not err in holding that the Government was entitled to a cancellation of the patent.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

PEOPLE'S TOBACCO COMPANY, LIMITED, *v.* AMERICAN TOBACCO COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 124. Argued January 4, 7, 1918.—Decided March 4, 1918.

As applied to a corporation defendant, the provision of the Sherman Act of 1890, § 7, allowing actions for treble damages to be brought in the district in which the defendant "resides or is found," means that the corporation must be present in the district, by its officers or agents, carrying on its business.

Upon consideration of the evidence, *held*, that the defendant corporation of New Jersey undertook in good faith to carry out a decree of dissolution made by the Circuit Court in New York, and to divest itself of a former branch business in Louisiana; and that subsequent service of process, upon the former manager of that business, in Louisiana, was ineffectual to bind the corporation.

Defendant's revocation of its designation of a former manager of its

former branch business in Louisiana, as its agent upon whom process might be served under the law of that State, was effectual, notwithstanding the instrument of revocation, attested under its seal and filed with the Louisiana Secretary of State, was executed by a vice president of the corporation, without formal sanction by the board of directors; it appearing that the vice president acted with the knowledge and consent of the corporation in carrying out the decree of dissolution.

What constitutes such a doing of business as will subject a corporation to service of process depends upon the facts in each case. The general rule is that the business must be of a nature warranting the inference that the corporation has subjected itself to the local jurisdiction, and is, by its duly authorized officers or agents, present within the State or district where service is attempted.

The fact that a foreign corporation owns stock in local, subsidiary companies, does not bring it within a State for the purpose of service of process upon it; nor does the practice of advertising its wares in the State and sending into it its agents, who, without authority to make sales, to collect money or extend credit, merely solicit orders of the retail trade to be turned over to local jobbers, to whom the corporation sells its goods and who charge the retailers therefor.

The Louisiana Act of 1904 (Laws 1904, Act No. 54, p. 133), as amended in 1908 (Laws 1908, Act No. 284, p. 423), providing for service of process on the Secretary of State of Louisiana, is not applicable, as construed by the State Supreme Court, to foreign corporations which have withdrawn from the State and ceased to do business there at the time of service, as in this case.

Affirmed.

THE case is stated in the opinion.

Mr. Edwin T. Merrick, with whom *Mr. Ralph J. Schwarz* was on the brief, for plaintiff in error:

Jurisdiction of the United States courts usually depends upon whether the defendant is an inhabitant or resident of the district where the suit is brought. When, therefore, the Sherman Anti-Trust Act provides (§ 7) that a defendant violating that act may be served where "found," it is apparent, we submit, that whether the defendant resided in or inhabited the district, or even whether it had

an agent in the district, is not the test. The test would seem to be whether the defendant violating this law may, by fair and reasonable process, be located and reached in the State and district where the injury was committed, without regard to the presence of an agent in the State, designated as such. Louisiana Act No. 149 of 1890, provides that whenever an outside corporation shall do any business whatever in the State without designating an agent upon whom process may be served, it may be sued upon any cause of action in the parish where the right or cause of action arose, and service of process may be made upon the person or persons, firm or company, acting or transacting such business for such corporation. With this act in force, defendant company entered the State, actually designated an agent therein and actually did business therein for many years. It thus came into the State accepting the terms of this statute. Mr. Irby and the Irby Branch of the American Tobacco Company were the ones, concededly, who transacted the business for, and acted for, the company in Louisiana, under the terms of the foregoing statute, and were so acting when the cause of action herein sued upon arose. Hence, we submit, that the defendant may be "found" within the State, by service upon the one thus transacting its business. *American Cotton Co.* v. *Beasley*, 116 Fed. Rep. 256. This is constitutional. *St. Clair* v. *Cox*, 106 U. S. 350, 356.

The business was not purely interstate in character; and whether such or not, the fact that it was actually being done in Louisiana makes the company subject to process and makes it "found" within the State, within the meaning of the Sherman Law. While the State might not be able to prevent such business or might not be able to burden it with licenses or taxation, because of the Constitution of the United States, none the less, such acts constitute doing business within the State and subject the defendant to service within the State as being "found"

therein. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 105; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 585.

The so-called revocation of the power of attorney is merely a statement by a vice president and an assistant secretary that the American Tobacco Company has revoked authority of its resident agent and that the corporation has caused its seal and name to be subscribed. The corporation never considered the revocation. We think it will scarcely be denied that the action of the board of directors in making the appointment cannot be set aside by a vice president of the company without some evidence better than has been shown in the record that the vice president had the power to annul a formal resolution of the board of directors. Under the laws of Louisiana, as under general law, there was no authority in a vice president to revoke the power of attorney issued under the authority of the board of directors. Even a president's power is not thus conceded by the authorities. *Jackson Brewing Co.* v. *Canton*, 118 Louisiana, 826, 827.

The constitution and law of Louisiana required the appointment as a condition precedent to the right to do business, with the object of gaining jurisdiction over corporations so doing. This jurisdiction cannot be defeated and frustrated as to business done under the license to enter the State by withdrawing the power of attorney. *Michael* v. *Mutual Ins. Co.*, 10 La. Ann. 738; *Davis* v. *Kansas & Texas Coal Co.*, 129 Fed. Rep. 149; *Mutual Reserve Assn.* v. *Phelps*, 190 U. S. 148; *Mutual Ins. Co.* v. *Spratley*, 172 U. S. 617; *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 587.

Mr. Junius Parker and *Mr. George Denegre*, with whom *Mr. Victor Leovy* and *Mr. Henry H. Chaffe* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

On January 4, 1912, the People's Tobacco Company, Limited, began suit against the American Tobacco Company in the District Court of the United States for the Eastern District of Louisiana to recover treble damages under § 7 of the Sherman Act of 1890. On January 5, 1912, service of process was made upon W. R. Irby as manager of the company. On January 16, 1912, the company filed exceptions to the service on the ground that it was a corporation organized under the laws of the State of New Jersey; that it was not found within the Eastern District of Louisiana or in the State of Louisiana, and was not engaged in business there, nor had it an agent therein; that W. R. Irby, upon whom service had been attempted, was not an officer, agent, or employee of the defendant, the American Tobacco Company, or authorized to accept service of process upon it at that time. On January 25, 1912, service was made upon the Assistant Secretary of State of Louisiana. Exceptions to that service upon practically the same grounds were filed by the defendant company. A further service was undertaken on February 2, 1914, on the Secretary of State of Louisiana and like exceptions were filed by the defendant company to that service.

Testimony was taken and upon hearing the District Court held that:

1. W. R. Irby was not the agent of the company at the time of the attempted service, and, therefore, the service upon him did not bring the company into court;

2. That the American Tobacco Company was not doing business in Louisiana at the time of the attempted service;

3. That the attempted service upon the Secretary of State of Louisiana did not bring the defendant corporation into court.

Section 7 of the Sherman Act provides that suits of the character of the one now under consideration may be brought in the district in which the defendant "resides or is found." When applied to a corporation this requirement is the equivalent of saying that it must be present in the district by its officers and agents carrying on the business of the corporation. In this way only can a corporation be said to be "found" within the district. In that manner it may manifest its submission to local jurisdiction and become amenable to local process.

The testimony shows that up to November 30, 1911, the American Tobacco Company had a factory in New Orleans for the manufacture of tobacco and cigarettes known as the W. R. Irby Branch of the American Tobacco Company, of which W. R. Irby was manager. Under the law of the State it had filed in the office of the Secretary of State an appointment of W. R. Irby as agent, upon whom service of process might be made.

On November 16, 1911, the Circuit Court of the United States for the Southern District of New York made a decree dissolving the American Tobacco Company. Among other things that decree provided that the American Tobacco Company should convey its W. R. Irby Branch to a company to be formed and known as the Liggett and Myers Tobacco Company. Conveyances were made to carry out this purpose.

The American Tobacco Company by an instrument executed by Mr. Hill, its vice president, revoked the authority of W. R. Irby as its resident agent, and filed the revocation of authority in the office of the Secretary of State of Louisiana on December 15, 1911. W. R. Irby testified that thereafter he was the manager of the Liggett and Myers Tobacco Company, and that he had no connection whatsoever with the American Tobacco Company, nor had he drawn any salary from that company since December 1, 1911.

It is true that the record discloses some instances in which collections were made upon bills in the name of the Irby Branch of the American Tobacco Company after the revocation of Mr. Irby's authority as its agent. Most of them were stamped across the face, Liggett and Myers Tobacco Company.

There remained on hand with the Irby Branch at the time of the dissolution a quantity of cigarette paper which was continued to be delivered to purchasers by the employees of the Irby Branch of the Liggett and Myers Tobacco Company upon orders received from the American Tobacco Company, and for its benefit and upon its account. This practically continued until the stock was exhausted, which the testimony shows was within a month after the dissolution, and before the attempted service of process in this case.

There were lodged in the custom house in New Orleans powers of attorney of the American Tobacco Company giving authority to those named therein to do what was necessary to make out export papers on behalf of the company. These powers of attorney do not appear to have been revoked, and existed after the service of process. The defendant company issued circulars subsequent to the time it was served with process in this suit, it also advertised in the New Orleans newspapers.

A consideration of all the testimony leads us to the conclusion that the American Tobacco Company undertook in good faith to carry out the decree of dissolution, and to take that company out of business in the State of Louisiana. It is true, as found by the District Court, that at the time of the service, and thereafter, the American Tobacco Company was selling goods in Louisiana to jobbers, and sending its drummers into that State to solicit orders of the retail trade, to be turned over to the jobbers, the charges being made by the jobbers to the retailers. It further appears that these agents were not

domiciled in the State, and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it. It also appears that the American Tobacco Company owned stock in other companies which owned stock in companies carrying on the tobacco business in the State of Louisiana. With these facts in mind we come to a consideration of the proper disposition of the case.

We agree with the District Court that Irby at the time of the attempted service upon him was not the authorized agent of the American Tobacco Company. On December 1, 1911, the American Tobacco Company conveyed its Irby Branch to the Liggett and Myers Tobacco Company. On the same day W. R. Irby, who had been the designated agent of the defendant company, resigned as a director of the American Tobacco Company, and ceased to remain in its employment. On December 15, 1911, the power of attorney was revoked, as we have hereinbefore stated, by the company filing an instrument of revocation in the office of the Secretary of State of Louisiana; it is true that the revocation was by one of the vice presidents of the company and was attested by the seal of the corporation. But we are not impressed with the argument that this revocation was ineffectual because not sanctioned by formal action of the board of directors of the company. The vice president seems to have had authority in the matter. Apparently he acted with the knowledge and acquiescence of the corporation, and was carrying into effect the decree of dissolution.

Upon the broader question, we agree with the District Court that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we

shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218, 226.

The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there. *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; *Philadelphia & Reading Co.* v. *McKibbin*, 243 U. S. 264, 268. As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 268.

The plaintiff in error relies upon *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Har-

vester Company amenable to the process of the courts of that State.

As to the attempted service of process upon the Secretary of State of Louisiana under the Louisiana Act of 1904 [Laws 1904, Act No. 54, p. 133], as amended 1908, [Laws 1908, Act No. 284, p. 423], we understand the act, as construed by the State Supreme Court, is not applicable to foreign corporations not present within the State and doing business therein at the time of the service, and having as in this case withdrawn from the State and ceased to do business there. *Gouner* v. *Missouri Valley Bridge & Iron Co.*, 123 Louisiana, 964.

We reach the conclusion that the District Court did not err in maintaining the exceptions filed by the defendant company and in quashing the attempted service made upon it.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

BRADER *v.* JAMES, FORMERLY REEVES.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 126. Argued January 7, 8, 1918.—Decided March 4, 1918.

Under the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902, c. 1362, 32 Stat. 641, a homestead allotment of a full-blood Choctaw became free from the restrictions imposed by § 12 at the death of the allottee, and the heir of the allottee, though a full-blood, might alienate the land without approval of the

conveyance by the Secretary of the Interior. *Mullen* v. *United States*, 224 U. S. 448.

But, by virtue of the Act of April 26, 1906, c. 1876, 34 Stat. 137, § 22, the right in such case was again restricted so that the full-blood heir could no longer convey without the Secretary's approval.

In determining the effect of the Act of 1906, *supra*, upon the right of a full-blood Indian to alienate, no distinction can be made between cases in which restrictions, previously imposed, were existent at the date of the act (*Tiger* v. *Western Investment Co.*, 221 U. S. 286), and those in which they had expired. Congress was dealing with tribal Indians still under its control and subject to national guardianship; and the act, comprehensive, and applying alike to all the Five Civilized Tribes, evinces a purpose to substitute a new and uniform scheme controlling alienation as to all the full-blood allottees and their full-blood heirs. Section 22 is to be construed accordingly.

In view of the repeated decisions of this court, there can be no doubt of the constitutional authority of Congress to impose the new restriction. *United States* v. *First National Bank*, 234 U. S. 245; and *United States* v. *Waller*, 243 U. S. 452, distinguished.

49 Oklahoma, 734, affirmed.

THE case is stated in the opinion.

Mr. E. A. Blythe and *Mr. D. M. Tibbetts*, with whom *Mr. Fred W. Green* and *Mr. J. H. Brader* were on the briefs, for plaintiff in error:

The Act of April 26, 1906, was general, applying to all of the Five Civilized Tribes. There was no repeal by express reference of the former special acts relating to their lands and therefore their provisions remained unless repealed by necessary implication. *Washington* v. *Miller*, 235 U. S. 422; Endlich on Interpretation of Statutes, § 223; *Jefferson* v. *Cook*, 155 Pac. Rep. 852.

The Act of 1906, while making the retrictions in some instances more burdensome upon allotted lands (§ 19), is essentially intended to relieve restrictions upon inherited lands (§ 22). Being prospective and permissive in terms, it should not be construed as an attempt to affect the status of lands upon which restrictions had been removed

or had expired by virtue of a prior special act. *United States* v. *Hemmer*, 241 U. S. 379; *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432.

The estate acquired by Rachel James upon the death of her mother was an estate in fee simple, free from all restrictions upon alienation by reason of contractual relations existing between the members of the Choctaw and Chickasaw Tribes and the United States by virtue of the Act of July 1, 1902, and therefore Congress retained no power thereafter to diminish her estate or property in the real estate so acquired by a later enactment. *Choate* v. *Trapp*, 224 U. S. 665; *Jones* v. *Meehan*, 175 U. S. 1; *Holden* v. *Joy*, 17 Wall. 211; *Wilson* v. *Wall*, 6 Wall. 83; *Bartlett* v. *United States*, 203 Fed. Rep. 410.

She became a citizen of the United States by the Act of March 3, 1901, 31 Stat. 1447. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

By the gift of citizenship the foreign or dependent status of the members of the nation or tribe was changed in all particulars except as to such choses in action, annuities and other reserve properties as were originally retained by the United States in the different acts of Congress leading up to and preceding the gift of citizenship. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Tiger* v. *Western Investment Co.*, *supra*; *United States* v. *Bartlett*, 235 U. S. 72.

The lands in controversy were allotted and inherited by a citizen of the United States, free from restrictions, with a full vested right of alienation. *Sunday* v. *Mallory*, 237 Fed. Rep. 526; *Bartlett* v. *United States*, 203 Fed. Rep. 410; *United States* v. *Hemmer*, 241 U. S. 379.

The power of Congress is limited to the extension of restrictions already existing and it cannot go so far as to impose restrictions upon lands against which none existed at the time of the act, belonging to a citizen. *Tiger* v. *Western Investment Co.*, *supra*; *Heckman* v. *United States*,

224 U. S. 413; *Choate* v. *Trapp, supra; Bartlett* v. *United States, supra; Sunday* v. *Mallory, supra.*

Mr. A. M. Works and *Mr. Joseph C. Stone* for defendant in error:

The Act of April 26, 1906, provides a comprehensive scheme which affects all the full-blood citizens of the Five Civilized Tribes and their full-blood heirs and all of their allotted lands in the Indian Territory. It is a substitute for, and repeals all prior legislation relating to restrictions upon full bloods.

The literal and natural meaning of § 22 of the act brings the allotted lands theretofore unrestricted within the terms of the act requiring all conveyances by full-blood Indian heirs of their inherited allotments to be approved by the Secretary of the Interior.

To construe § 22 so as to require all conveyances by Indian heirs of the full blood conveying their allotted lands to be made under the supervisory control of the Secretary of the Interior is in full accord with the general spirit and policy of the entire act and other legislation *in pari materia.* The necessity for supervision was the same whether the lands were theretofore alienable without approval or alienable only with the approval of the Secretary. The act should be construed liberally in the interest of the Indians to meet the necessities of the Indians, and to correct, as Congress intended, the mistakes of prior legislation. Sections 19 and 23 aid in the construction of § 22.

Section 22 provides merely a procedure for the alienation of their inherited lands by full-blood Indian heirs and does not prohibit the alienation thereof, nor does it impair any property rights or contractual relations. The method of procedure provided is reasonable, and is analogous to many state laws which permit the sale of the family homestead only with the approval of the spouse

of the grantor. The grantee of the Indian cannot avail himself of the right, if any, of the Indian to assert the unconstitutionality of the act which provides this procedure.

The authority of Congress to enact §§ 22 and 19 and similar provisions in the act is grounded in necessity because the power exists nowhere else. The dependence of the Indians on the one hand and the duty of the Government on the other have resulted in a well established governmental policy commensurate with the needs of the Indians, and Congress alone must determine when this policy, called a guardianship, is determined.

This case is not distinguishable from *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

Mr. Assistant Attorney General Kearful, by leave of court, filed a brief on behalf of the United States as *amicus curiæ*, contending that the Act of 1906 applied and was within the power of Congress. On the latter point it was said:

In *Tiger* v. *Western Investment Co.*, 221 U. S. 286, it was held that Congress had the power to extend the period of restriction on full-blood allotments. There is no substantial difference, so far as concerns the Indian's property right, between the extension of an existing restriction period and the re-imposition of the same restriction for a given time after the expiration of the original period. The reasons which justify such action are the same in the one case as in the other. Notwithstanding the grant of citizenship and the removal of restrictions, the duty of protection which the Nation owes to dependent Indians is not discharged and the national honor which has been pledged to the fulfillment of that obligation remains. Even the grant of citizenship to tribal Indians may be, as it has been in a measure, retracted. *United States* v. *Pelican*, 232 U. S. 442, 450–451. The power to deal with their

affairs is not to be measured by a single act of hasty legislation. *United States* v. *Celestine*, 215 U. S. 278, 290–291. The national interest in them is not to be expressed in terms of property. *Heckman* v. *United States*, 224 U. S. 413, 437. So long as they are maintained as wards of the Nation—and it is not to be denied that the full bloods of the "Five Civilized Tribes" are still so maintained—the power to adopt any measure which in the judgment of Congress is needful for their protection is "a continuing power of which Congress could not divest itself." *United States* v. *Nice*, 241 U. S. 591, 600.

Mr. Justice Day delivered the opinion of the court.

This case involves the right of Rachel James, a full-blood Choctaw Indian, to convey certain land. The land was originally allotted to Cerena Wallace under the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902, 32 Stat. 641. As to the homestead allotment, which is here in question, § 12 of said agreement provided that it should be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Cerena Wallace, mother of Rachel James, and herself a full-blood Choctaw Indian, died October 27, 1905, leaving her daughter, Rachel James, sole surviving heir at law. On August 17, 1907, Rachel James, joined by her husband, conveyed the land, embraced in the original homestead allotment, with some other lands, to Tillie Brader, who conveyed by quit-claim deed of September 13, 1909, to the plaintiff in error. The conveyance by Rachel James to Tillie Brader was not approved by the Secretary of the Interior. Rachel James prosecuted this suit to recover the land, and for use and occupation thereof, basing her right of recovery on the fact that her conveyance had not been approved by the Secretary of the Interior. She succeeded in the court of original jurisdiction, and the judgment

was affirmed by the Supreme Court of Oklahoma. 49 Oklahoma, 734.

The case as brought to our attention involves two questions:

1. Could a full-blood Choctaw Indian, after the passage of the Act of April 26, 1906, 34 Stat. 137, convey the lands inherited from a full-blood Choctaw Indian, to whom the lands had been allotted in her lifetime, without the approval of the Secretary of the Interior?

2. If such conveyance were made valid by the act of Congress only with the approval of the Secretary of the Interior, is such legislation constitutional?

As to the homestead allotment to the mother, Cerena Wallace, under the Supplemental Choctaw and Chickasaw Agreement of July 1, 1902, Rachel James as her heir at law received the land free from restriction, and had good right to convey the same unless prevented from so doing by the Act of April 26, 1906. *Mullen* v. *United States*, 224 U. S. 448. As the conveyance here in question was subsequent to the Act of April 26, 1906, if that act covers the case, and is constitutional, Rachel James may not convey without the approval of the Secretary of the Interior, and the judgment below was right.

The Act of April 26, 1906, was before this court in *Tiger* v. *Western Investment Co.*, 221 U. S. 286. In that case it was held that a full-blood Indian of the Creek Tribe, after the passage of the Act of April 26, 1906, could not convey land which he had inherited, and which was allotted under the act of Congress known as the Supplemental Creek Agreement of June 30, 1902, 32 Stat. 500, and as to which the five years named in § 16 of that act had not expired when Congress passed the Act of April 26, 1906, without the approval of the Secretary of the Interior. In that case, as in this, a construction of § 22 of the last-named act was directly involved. That section provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The conveyance by Rachel James is within the terms of the section as construed in the *Tiger Case*, unless the fact that the restriction of the act under which she inherited had expired when the Act of April 26, 1906, was passed, whereas in the *Tiger Case* the former limitation had not expired when the act was passed, makes such difference as to require a different ruling in the present case. We are of opinion that this fact does not work a difference in result. As set forth in the opinion in the *Tiger Case*, the Act of April 26, 1906, was a comprehensive one, and intended to apply alike to all of the Five Civilized Tribes, and to make requirements as to conveyances by full-blood Indians and the full-blood heirs of Indians, which should take the place of former restrictions and limitations. The purpose was to substitute a new and uniform scheme controlling alienation in such cases, operating alike as to all the Civilized Tribes. Notwithstanding Rachel James might have conveyed the homestead allotment after it descended to her, she was a Tribal Indian, and as such

still subject to the legislation of Congress enacted in discharge of the Nation's duty of guardianship over the Indians. Congress was itself the judge of the necessity of legislation for this purpose; it alone might determine when this guardianship should cease.

The argument that the language in the last sentence of § 22 must be taken to mean that Congress had no intention to deal with restrictions under former acts, certainly not with those which had expired, is answered by the consideration that Congress was dealing with Tribal Indians, still under its control and subject to national guardianship. In the terms of this act Congress made no exception as to rights of alienation which had arisen under former legislation, and it undertook, as we held in the *Tiger Case*, to pass a new and comprehensive act declaring conveyances, of the class herein under consideration, to be valid only when approved by the Secretary of the Interior.

In view of the repeated decisions of this court we can have no doubt of the constitutionality of such legislation. While the tribal relation existed the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of Indians still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the *Tiger Case*. The doctrine is reiterated in *Heckman* v. *United States*, 224 U. S. 413, and *United States* v. *Nice*, 241 U. S. 591, 598.

88. Syllabus.

The plaintiff in error relies upon *Choate* v. *Trapp*, 224 U. S. 665, in which this court sustained a contractual exemption as to taxation of certain Indian lands. In that case the right of exemption was based upon a valid and binding contract, and that decision in no wise militates against the right of Congress to continue to pass legislation placing restrictions upon the right of Indians to convey lands allotted as were those in question here. In *United States* v. *First National Bank*, 234 U. S. 245, and *United States* v. *Waller*, 243 U. S. 452, this court dealt with lands as to which certain mixed-blood Indians by act of Congress had been given full ownership with all the rights which inhere in ownership in persons of full legal capacity. Those decisions do not place limitations upon the right of Congress to deal with a Tribal Indian whose relation of ward to the Government still continues, and concerning whom Congress has not evidenced its intention to release its authority.

We find no error in the judgment of the Supreme Court of Oklahoma, and the same is affirmed.

Affirmed.

EIGER ET AL. *v.* GARRITY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 143. Argued January 22, 23, 1918.—Decided March 4, 1918.

A state statute giving a wife a right of action against any person who injures her means of support by selling intoxicating liquor to her husband, does not violate the due process clause of the Fourteenth Amendment by providing further that the judgment for damages so recovered shall be a lien upon the premises where the liquor was sold, as against an owner who leased, or knowingly permitted the use of, such premises for the sale of intoxicating liquor.

Dram Shop Act, Illinois Rev. Stats., c. 43, § 10, upheld as involved in this case.

Such a statute has the effect of making the tenant the agent of the landlord for its purposes; and the landlord is not denied due process by taking the judgment against the tenant, (in the absence of collusion or fraud,) as conclusive upon the amount of the damages suffered and the right to recover them, if, in the proceeding to enforce the lien, the landlord be allowed due opportunity to controvert the rendition of such judgment and the making of the lease authorizing sale of intoxicating liquor, or, if such be the issue, his knowledge of such use of the premises.

272 Illinois, 127, affirmed.

THE case is stated in the opinion.

Mr. Abraham J. Pflaum, with whom *Mr. Edward N. D'Ancona* was on the brief, for plaintiffs in error.

Mr. Ode L. Rankin for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by Delia Garrity to subject premises in Chicago owned by plaintiffs in error to the payment of a judgment obtained by her against Clarence Green by reason of injury sustained to her means of support through sales of intoxicating liquors to her husband by Green, who was a tenant of the plaintiffs in error occupying and using their premises for the sale of such liquors.

In her complaint she sets forth that she was the wife of one William J. Garrity; that Clarence Green on June 18, 1912, and for one year prior thereto was the owner of and did conduct what is commonly known as a saloon or dram shop, and during such period of time sold intoxicating liquors in such shop in a certain building at 134 North Dearborn Street, Chicago, standing upon certain premises described in the bill; that on June 18, 1912, she began a suit in the Circuit Court of Cook County, Illinois, against

said Green, under the provisions of statutes of the State of Illinois known as the Dram Shop Act, to recover damages for injury to her means of support, and alleged in the declaration in said suit that she was the wife of William J. Garrity on and prior to June 18, 1912; that said Green sold and gave intoxicating liquors to her husband, which liquor in whole or in part caused the said Garrity to become habitually intoxicated, and alleged injury to her means of support resulting therefrom in the sum of $10,000; that summons was duly served on said Green, that he failed to appear, and on September 26, 1912, an order of default was entered against him, and thereupon the case came for trial before the judge and jury for the assessment of damages; that on October 2, 1914, the court and jury having heard the testimony, the jury returned a verdict finding said Green guilty, assessed the plaintiff's damages in the sum of $1,500, and judgment was rendered accordingly. The bill then alleges leasehold ownership of the land and ownership of the building in the plaintiffs in error, and that for a year or more prior to the filing of the suit in the Circuit Court of Cook County said Green occupied the building on the premises for the purpose of the sale of intoxicating liquors as tenant of the plaintiffs in error, who leased said building and premises to, and knowingly permitted said building and premises to be occupied by, said Green for the sale of intoxicating liquors for the period of a year or more prior to the filing of the suit in the Circuit Court of Cook County; that the liquors sold or given to Garrity on said premises were the sales or gifts which resulted in the verdict and judgment aforesaid; and such sales or gifts were made or given while the said Green occupied the said building as tenant of the plaintiffs in error, and with their knowledge and consent, for the purpose of keeping a dram shop, and the complainant seeks to have the building and premises charged with a lien for the payment of the judgment and costs, and

prays that in default of the payment of the judgment, interest and costs, that said building and the premises described in the bill be sold to satisfy the judgment.

A demurrer to the bill was overruled and the court made a decree in substance finding the allegations in the bill to be true, and adjudged that in default of the payment of the judgment, with interest, the said building, leasehold and premises of the plaintiffs in error should be subjected to sale for the payment thereof. Upon appeal the Supreme Court of Illinois affirmed the decree, holding, among other things, that the statute did not deprive the plaintiffs in error of their property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States, 272 Illinois, 127. The decree was rendered under § 10, c. 43, of the Revised Statutes of that State, which provides:

"For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so

leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied, as aforesaid: *Provided*, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

Construing this section with the preceding section (9) (printed in the margin [1]), the Supreme Court of Illinois held that the purpose of § 10 was to make the building or premises used for the sale of intoxicating liquors liable for the payment of a judgment rendered against the occupant of the premises wherein the liquor was sold, provided the

[1] Section 9: "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this state having competent jurisdiction."

owner had rented the same to be used or occupied for the sale of intoxicating liquors, or knowingly permitted the same to be so used and occupied. The court held that the judgment against the tenant, in the absence of fraud or collusion, was conclusive in the action under § 10 to subject the building and premises to its payment, except that the owner of the building is entitled to controvert the allegations that he had knowingly rented or knowingly permitted his building to be used for the sale of intoxicating liquor, and that a judgment had been recovered against the occupant for damages arising from the sale of liquor therein. The question in this court is whether the act, as thus construed, deprives the plaintiffs in error of their property without due process of law.

The right of the States to pass laws for the regulation of the traffic in intoxicating liquors, and to legislate with a view to repress the evil consequences which may result therefrom, has been frequently affirmed in this court. *Crane* v. *Campbell*, 245 U. S. 304. In the opinion in that case the former cases in this court sustaining the authority of the State to deal with the evils resulting from the sale and use of intoxicating liquor are cited, and we need not review them now.

Under this broad power over the liquor traffic, and the right to pass legislation to prevent its evils, the State of Illinois has made the premises of an owner in that State subject to a lien for damages recovered by a wife for injury to her means of support against one who has furnished the husband intoxicating liquor which was sold upon the premises sought to be charged, when the owner had rented the same for the purpose of the sale of intoxicating liquor, or had knowingly permitted such sales upon his premises.

The owner of such building has no absolute right to rent his property for any and all purposes. The use of property may be regulated under the police power of the

State in the public interest in such manner as to safeguard the health and welfare of the community. Certainly there is no right, beyond the reach of legislative control, to rent premises for the sale of intoxicating liquor. The State may consistently with due process of law prohibit the rental of premises for such purposes. In this instance it has undertaken to regulate the right to rent property for the sale of intoxicating liquors by making the premises so used subject to a lien for a judgment for damages because of the deprivation of the means of support of the wife resulting from the intoxication of the husband upon whom she depends for support. Obviously, the State may pass laws to meet this as well as other evil consequences likely to follow from the traffic. See *Marvin* v. *Trout*, 199 U. S. 212, 224, 225.

The stress of the argument for plaintiffs in error is laid upon the want of notice to the landlord and the lack of opportunity to be heard as to the right of recovery and the amount thereof, before his property can be subjected to the lien of such judgment. But the effect of this statute is to make the landlord responsible only when he rents his property for the use and sale of intoxicants, or knowingly permits its use for that purpose. The statute has the effect of making the tenant the agent of the landlord for its purposes, and through this agency, voluntarily assumed, the landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them.

It was the owner's privilege to rent the property to a lessee of his own choosing, and to safeguard himself by the amount of the rent reserved, or otherwise, for the possible damages resulting from the traffic in intoxicants which the landlord has agreed may be carried on in his premises. The property is not summarily taken, the owner may be heard to deny the rendition of the judgment against the tenant, the making of the lease author-

izing the sale of intoxicating liquor, or, if his knowledge of such use be the issue, he may be heard upon that question. *Mullen* v. *Peck*, 49 Ohio St. 447; *Bertholf* v. *O'Reilly*, 74 N. Y. 509.

In view of the broad authority of the States over the liquor traffic, and the established right to prohibit or regulate the sale of intoxicating liquors, we are unable to discover that there has been a deprivation of property rights in the legislation in question in violation of due process of law secured by the Fourteenth Amendment.

Judgment affirmed.

TALLEY *v.* BURGESS ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 157. Argued January 25, 1918.—Decided March 4, 1918.

The Cherokee Agreement of July 1, 1902, c. 1375, 32 Stat. 716, imposed no restriction, other than that of minority, upon the alienation by the heir of his interest in land allotted under § 20 in the name of an ancestor who died before receiving an allotment.

The Act of April 26, 1906, c. 1876, 34 Stat. 137, § 22, applied to allotments made before its date under § 20 of the Cherokee Agreement (*Brader* v. *James*, *ante*, 88,) and required that a guardian's contract, made on May 11, 1906, to convey the minor's interest in such an allotment, be approved by the United States court for the Indian Territory, as a condition to the validity of the contract.

46 Oklahoma, 550, affirmed.

THE case is stated in the opinion.

Mr. Haskell B. Talley, pro se, submitted.

Mr. Thomas D. Lyons, with whom *Mr. Benjamin F. Rice* was on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by H. B. Talley in the District Court of Tulsa County, Oklahoma, for the specific performance of a certain contract entered into by Nora B. Burgess, mother and guardian of the defendant in error, Daniel S. Burgess, a minor, with the law firm of Talley & Harnage. Harnage refusing to join in this action it was brought by Talley alone. Harnage was made a defendant to the suit. The petition sets forth that the contract was for professional services in consideration of which the attorneys were to receive a one-half interest in the one-third interest of the defendant in error, Daniel S. Burgess, in certain Cherokee allotted land. The contract was made on May 11, 1906, and the allotment in question was embraced in a selection of land made by Nora B. Burgess, as administratrix of the estate of John S. Burgess, the latter, the father of Daniel S. Burgess, having died without having selected or received an allotment.

The petition states that on May 11, 1906, Talley & Harnage entered into contracts with the other heirs of John S. Burgess similiar to those entered into with the defendant in error.

The land in controversy, it is set forth, was originally allotted to defendant's mother, an intermarried Cherokee Indian, but the attorneys procured a cancellation of that allotment and then another allotment of the same in the name of the defendant's father, this allotment being selected by the administratrix in his right. The petition avers that defendant's share had been set apart to him, and that at the time of the beginning of the suit he was in the quiet enjoyment thereof. The Circuit Court appointed a guardian *ad litem* for the defendant in error, Daniel S. Burgess, and a motion was filed, treated in the courts below as a demurrer, and the trial court held that

under the statutes of the United States the guardian could not dispose of the ward's property, as she had undertaken to do, except under order of the proper United States court on petition filed for that purpose; and that the attempted sale by the guardian without court procedure was void. On error the Supreme Court of Oklahoma affirmed the judgment of the Circuit Court of Tulsa County. 46 Oklahoma, 550.

The case as presented in this court involves two questions:

1. Whether the Act of April 26, 1906, 34 Stat. 137, is applicable to the present suit.

2. If applicable, whether conveyances of the kind here involved, of the ward's interest in the allotted lands, could be made by his guardian without an order of court.

The land was allotted under the Cherokee Agreement, 32 Stat. 716, which provides in § 11 for allotment by the Commission to the Five Civilized Tribes to each citizen of the Cherokee Tribe, after approval by the Secretary of the Interior of the enrollment provided, of land equal in value to 110 acres, to be selected by each allottee so as to include his improvements. Section 13 provides for the designation of a homestead out of said allotment equal in value to forty acres of the lands of the Cherokee Nation, to be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the allotment. Section 14 provides that lands allotted to citizens shall not in any manner be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of the act. Section 15 provides that all lands allotted to the members of the tribe, except such as are set aside for a homestead, shall be alienable five years after issuance of patent. Section 20 provides:

"If any person whose name appears upon the roll pre-

pared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allottment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted."

It may be regarded as established that the Cherokee Agreement, in view of the sections just considered, imposes no restrictions upon alienation of the interest in the land thus going to the heir, other than that of minority. *Mullen* v. *United States*, 224 U. S. 448; *Skelton* v. *Dill*, 235 U. S. 206; *Adkins* v. *Arnold*, 235 U. S. 417. However, the agreement upon which this suit was brought was made after the passage of the Act of April 26, 1906, a statute with which this court has had occasion to deal in recent decisions. Its scope and purpose were dealt with in *Brader* v. *James*, just decided, *ante*, 88. That act, as its title indicates, is a comprehensive one for the final disposition of the affairs of the Five Civilized Tribes. Section 22 provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult

and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It is contended that this section applies only to heirs of a deceased Indian whose selection has been made by himself, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which the decedent belonged. But in our view Congress in the passage of § 22 had in contemplation that an Indian duly enrolled and entitled to share in the tribal property and lands might die before receiving the allotment to which he, or she, was entitled. Congress had made provision in § 20 of the Cherokee Agreement that such land might be allotted in the name of the deceased, and should with the proportionate share of the other tribal property descend to the heirs of the one who would have been entitled, if living. It also provided that the selection for a decedent should be made by a duly appointed administrator or executor, or, in default of such selection, the Dawes Commission should designate the land to be allotted. We think minor heirs who thus receive lands are within the meaning and purpose of the statute, as much so as they would have been had the land been selected by the ancestor in his lifetime.

Section 22 being applicable to a conveyance of a minor's lands in the situation here presented, we come to the question whether the guardian could legally make disposition thereof without an order of the court of the United

States for the Indian Territory. It is contended that § 22, as enacted, makes the requirement as to the order of the court applicable only after organization of a State or Territory. Literally read the statute might lend itself to such interpretation. But minor heirs are required to join in the sale of the lands by a guardian duly appointed by the proper United States court for the Indian Territory. The next sentence specifically provides that the order of sale must be made upon petition filed by the guardian in the proper court of the county in which the land is situated. These provisions, read together, and construing the statute in the light of the purpose to be accomplished, we think, require court approval in both instances. It is not denied that the United States court for the Territory would have had jurisdiction of a proceeding by a guardian for an order to sell the ward's interests in the lands. (See *Robinson* v. *Long Gas Co.*, C. C. A., 8th Cir., 221 Fed. Rep. 398, where the applicable statutes are set out and considered.)

We cannot believe that Congress intended after territorial or state organization to require the guardian to procure the approval and order of a court before disposition of the ward's lands, and before the organization of a Territory or State to permit the guardian, who was required to be appointed by the United States court for the Indian Territory, which court had jurisdiction over the sale of the lands of the ward upon application of the guardian, to dispose of the ward's interests in lands without judicial approval. The Supreme Court of Oklahoma did not err in holding that the Act of April 26, 1906, was applicable, and that the interests in the lands of the ward could only be sold with the approval of the United States court for the Indian Territory, and its judgment is, therefore,

Affirmed.

ANICKER *v.* GUNSBURG ET AL., ADMINISTRATORS OF GUNSBURG, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 164. Argued January 28, 1918.—Decided March 4, 1918.

An oil and gas lease of the restricted land of a Creek full-blood is not valid without approval by the Secretary of the Interior. Act of May 27, 1908, § 2, c. 199, 35 Stat. 312.

When there are two such leases in conflict, one of which has been approved by the Secretary, the unsuccessful claimant, to charge his adversary as trustee, must show that, as matter of law, the Secretary erred both in approving the one lease and in refusing to approve the other.

And the facts that the plaintiff's lease was the first filed with the Union Agency, at Muskogee, and that it was recorded with the county register of deeds whereas defendant's was not; and any constructive notice coming from such filings and recordations under the Acts of March 1, 1907, c. 2285, 34 Stat. 1026, and April 26, 1906, c. 1876, 34 Stat. 145, and Arkansas statutes in force in the Indian Territory; and the effect of a rule of the Secretary of the Interior providing for the filing of leases within thirty days of execution—are all matters beside the case, where it does not appear affirmatively that the Secretary would have approved the plaintiff's lease if he had refused approval of the defendant's.

While the law does not vest arbitrary power in the Secretary, his approval of such leases rests in the exercise of his discretion; he may consider the advantages and disadvantages to the Indian and grant or withhold approval as his judgment may dictate—the courts may interfere to protect the rights of others only when they are invaded by clearly unauthorized action.

Action of the Secretary within his discretionary power is not vitiated by the fact that the reasons assigned in his discussion of the case when before him were not wholly sound.

226 Fed. Rep. 176, affirmed.

THE case is stated in the opinion.

Mr. Frank Hagerman, with whom *Mr. James W. Zevely*, *Mr. Richard W. Stoutz*, *Mr. James M. Givens*, *Mr. Jacob B. Furry* and *Mr. Edward C. Motter* were on the briefs, for appellant:

The law required the leases to plaintiff and defendants to be filed, recorded and approved by the Secretary of the Interior. When this was done, the instrument related back to the time of its execution.

Plaintiff's lease was executed March 28, 1912, filed with the Indian Commissioner on March 30, 1912, and recorded April 1, 1912. Defendants' lease, though executed March 20, 1912, was never filed till April 5, 1912, and was never at any time recorded.

The Department erroneously construed its Rule 2 to permit defendants to have full thirty days within which to file their unrecorded lease and, solely because filed within that time, to require its approval as against that of plaintiff. This construction was erroneous, for that the rule was at most a mere limitation upon the time within which the lessee, as between himself and the Government, should be required to ask for the approval of his lease. If within that time he failed to file, he, by his own act, thereby deprived himself of any right even to ask an approval. The effect of the failure to file or record is left to the provisions of the law. So construed, it answers a good purpose, is a lawful exercise of power and wholly consistent with the law. While the Act of May 27, 1908, 35 Stat. 312, provides for the approval by the Secretary "under rules and regulations" promulgated by him, this only means such as are reasonable and not in conflict or inconsistent with the law.

The Act of March 1, 1907, requiring the lease to be filed (34 Stat. 1026), simply made the filing constructive notice; for without notice, either actual or constructive, no subsequent *bona fide* purchaser could be affected. This statute fixed no time for the filing. It made that act,

whenever done, the equivalent of notice. If, however, time for that purpose were implied, as it should not be, it could only, at most, be a reasonable period. Thirty days' delay, as required by the original rule, was unreasonable. So it has been frequently decided under statutes requiring recording within a reasonable time.

Even if the rule be construed as postponing the time for filing, this in nowise extended the time for recording. There was no attempt below to deal with the necessity of recording. Yet the defendants' lease, if not recorded, was, under the law, not valid against the plaintiff. *Shulthis* v. v. *McDougal*, 170 Fed. Rep. 529; *Lomax* v. *Pickering*, 173 U. S. 26, 48. So, even if there was an excuse for the failure promptly to file the lease, which there was not, there was none for the neglect to record.

If, as here, the Secretary erred, as a matter of law, his act can be challenged by a bill of the character herein filed.

The Secretary rejected plaintiff's lease on the sole ground that a departmental rule gave defendants thirty days in which to file their lease, during which time plaintiff could acquire no interest. It is clear but for this construction of the law he would have received the lease which was awarded to defendants.

The Secretary here actually exercised his discretion by finding that both leases were in all respects satisfactory in form, properly secured and executed by proper lessees. Everything was decided which was necessary to a complete technical approval of each lease. The only reason for not calling it an actual approval of plaintiff's was the mistaken notion that the law gave defendants thirty days in which to file theirs, and during that period plaintiff was, as against them, incapacitated from acquiring any right. The effect of his finding was to approve plaintiff's lease. There can be an approval in an informal way, even a writing not always being necessary. *U. S. Bank* v. *Dandridge*, 12 Wheat. 64, 90.

The sole purpose of the approval was to protect the Indian against improvidence (*Shulthis* v. *McDougal, supra; Pickering* v. *Lomax*, 145 U. S. 310, 316; *Moore* v. *Sawyer*, 167 Fed. Rep. 826, 834), not to decide legal rights between conflicting claimants. Therefore, the question really is, whether the Department practically approved plaintiff's lease to the extent necessary to "protect the Indian against the improvident disposition of his property." A question of priority arose solely as between the respective lessees. This the Secretary assumed to decide. He then decided it erroneously.

Plaintiff was an innocent purchaser. But, whether he was or not, his rights, as such, and as against another lessee, could not be determined by the Secretary.

Mr. George S. Ramsey, with whom *Mr. John M. Chick*, *Mr. Edgar A. de Meules*, *Mr. Malcolm E. Rosser*, *Mr. Villard Martin* and *Mr. J. Berry King* were on the brief, for appellees.

Mr. Justice Day delivered the opinion of the court.

This is a contest between holders of oil and gas leases made by one Eastman Richard, a full-blood Creek Indian, the owner by patent of the west half of the northeast quarter of section 5 of township 17 N. range 7 E., in Creek County, Oklahoma. Richard made a lease of the west one-half of the quarter to David Gunsburg and the Southwestern Petroleum Company on March 20, 1912. This lease was not filed for record with the Indian Agency until April 5, 1912, nor was it recorded with the Register of Deeds for Creek County, Oklahoma. On March 28 1912, Richard made a like lease for the same premises to the appellant, William J. Anicker, which was filed with the Indian Agency on March 30, 1912, and on April 1, 1912, was filed for record with the Register of

Deeds for Creek County, Oklahoma. It thus appears that the lease to Gunsburg and the Southwestern Petroleum Company was earlier than the one to Anicker but the latter was first recorded. Upon hearing upon these conflicting leases the United States Indian Superintendent recommended the approval of the Gunsburg and Southwestern Petroleum Company lease.

After referring to the dates of the leases and the time of filing the same for record, the superintendent said:

"The Department has uniformly held in such cases that where a lease is filed, with the papers necessary for completion of same, within thirty days, that the date of execution is the date from which the priority of the lease is determined.

"To my mind this is the only reasonable construction of the regulations, so long as thirty days or any other period is allowed within which to file a lease. But it is contended on behalf of Mr. Anicker that the lease to Gunsburg and the Southwestern Petroleum Company was obtained by fraud. To this contention I cannot agree for the reason that this lease and the lease to Messrs. Funk & Riter were presented to this office on the date of execution, fully explained by Mr. William Kremer, Asst. Chief Clerk, a notary in this office, and acknowledged by the lessor. This contention the attorneys for Mr. Anicker were unable to support in their cross-examination of Eastman Richard, although it was apparent at that time that the lessor did not remember the names of the lessees. He was, however, confident that he had leased his entire allotment at that time, and it appears from Mr. Kremer's testimony, May 14, 1912, page 23, that the lease was fully explained to the lessor, as is done in all cases where leases are acknowledged before a notary in the employ of this office, and considering the numerous declarations and affidavits submitted bearing the lessor's signature in connection with this case, showing a change of attitude

upon every occasion approached in connection with these leases, and his lack of business ability, I am not inclined to entertain any doubt as to the fact that the lease was fully explained to him upon the date of execution thereof, notwithstanding his uncertainty at the hearing on May 13th and 14th as to the name of the lessee.

"It is further contended, in behalf of Mr. Anicker, that he should be considered prior lessee for the reason that his lease was made prior to the time the lease of Gunsburg and the Southwestern Petroleum Company was filed at the Union Agency or elsewhere, and that the same was not only filed in the county wherein the land is situate, but also filed at Union Agency at a date prior to the date upon which the lease to Gunsburg and the Southwestern Petroleum Company was received.

"It is also contended that he had no actual notice, and an attempt has been made to show that the lessor had conveyed the idea to Mr. Anicker or his agent that the only lease he had executed when approached by Mr. Anicker, was the lease in favor of the Eastern Oil Company. It will be noted in the testimony that an unsuccessful effort was made to secure an admission from Eastman Richard that would corroborate this contention.

"For the purposes of this case I do not consider it necessary to determine at this time whether or not the evidence at hand shows that such representations were made by the lessor; even admitting that the lessee was misled by the lessor, the regulations which provide thirty days within which a lease may be filed, if binding upon parties interested in securing leases, should be considered as heretofore, as giving that lease priority which bears the prior date of execution and is filed with the papers required, within the 30-day period.

"An examination of the lease to David Gunsburg and the Southwestern Petroleum Company discloses the fact that this lease was filed within thirty days, in accordance

with the regulations, and that the same was executed prior to the lease in favor of Mr. Anicker. Concerning the contention of Mr. Anicker that the date of filing should be regarded as the date of priority, which carries with it the contention that the regulations of the Secretary of the Interior allowing thirty days within which to file a lease is not within the power conferred on the Secretary of the Interior, under the law, which provides in part (Section 2, Act of Congress of May 27, 1908 [35 Stat. L. 312]): 'That leases of restricted lands for oil and gas mining purposes . . . may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior and not otherwise.'"

After upholding the right of the Secretary of the Interior to make rules and regulations the superintendent further said:

"The Secretary clearly having the right to fix a reasonable period within which time lessees may and must file their leases for approval, it follows that if such a regulation is made all lessees must receive the same treatment, both as to the benefits or privileges of taking the time allowed, or on the contrary the penalty, if they fail to comply with the regulation. If this policy was not followed, the rule might as well be abolished, but this would lead to many opportunities of double dealing on behalf of both lessees and lessors. It being almost a physical impossibility to execute, complete the papers and file leases simultaneously, a reasonable time must be given. The thirty-day rule has been in effect since the early days of oil lease development in the Five Tribes and persons taking leases almost universally understand that the date of the lease, if filed within the thirty-day period, governs, instead of the date of filing."

* * * * * * * *

"The lease of Mr. Anicker must also be disapproved

not because he was in any way delinquent himself, but because of the prior lease of David Gunsburg and the Southwestern Petroleum Company filed with all papers required within even a shorter period than that allowed by the Department."

The superintendent concluded that the lease in favor of Anicker should be disapproved, and the lease to Gunsburg and Southwestern Petroleum Company should be approved.

Upon hearing before the First Assistant Secretary of the Interior, that officer reached a like conclusion. A motion to reconsider was denied, the Secretary concluding:

"If there were any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the agency within the time required by regulation, Anicker would have that advantage. The Act of March 1, 1907 (34 Stat. 1026), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30, 1912. Until approved by the Secretary, it was not a completed instrument and the fact of its having been recorded in a county office can not estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval."

The plaintiff's bill was filed upon the theory that the lease to Gunsburg and Southwestern Petroleum Company had been approved by the Secretary by mistake of law, and that, but for the mistake, the lease of plaintiff would have been approved, and the bill sought to charge the defendants as trustees for the plaintiff, and to require an assignment of the lease to him. The District Court held against complainant, and that decree was affirmed by the Circuit Court of Appeals. 226 Fed. Rep. 176.

In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary

was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary. *Bohall* v. *Dilla*, 114 U. S. 47.

The statutes of the United States provide:

Section 20 of the Act of April 26, 1906, 34 Stat. 145: "All leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: . . . *Provided further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Section 2 of the Act of May 27, 1908, 35 Stat. 312: "That leases of restricted lands for oil, gas or other mining purposes, . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise. . . ."

The Act of March 1, 1907, 34 Stat. 1026: "The filing heretofore or hereafter of any lease in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

Under the authority to make rules the Secretary of the Interior provided:

"All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

Whatever may be the effect of this rule providing for

the filing of leases within thirty days from and after their execution, in view of the requirements of the statutes, the lease can have no validity without the Secretary's approval. The protection of the Indian's rights is left to the Indian Bureau of which the Secretary is the head, and the courts may only interfere to protect the rights of others when they are invaded by clearly unauthorized action.

Much stress is placed in argument upon the provisions of § 20 of the Act of April 26, 1906, requiring leases entered into for a period of more than one year to be recorded in conformity with the law requiring the recording of conveyances in force in the Territory; and upon the Act of March 1, 1907, providing that the filing of the lease in the office of the Indian Agency shall be deemed constructive notice. An elaborate argument is based on these requirements, and the statutes of Arkansas in force in the Territory are set out in the brief, which, it is contended, show the necessity of recording such instruments in order to give constructive notice to persons dealing with the title. But these requirements do not relieve the appellant of the primary difficulty of maintaining this suit; the lack of a showing that his lease would have been approved but for a mistake of law which resulted in the approval of the lease to another.

The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.

There is nothing in this record to show that approval of the appellant's lease has been given by the Secretary as required by the statute. On the contrary, it appears that the Secretary approved another lease of the same land, and has withheld his approval of the one under which the appellant claims. The Secretary declares in substance in the finding which we have quoted, being his final action in the case, that the prior recording of one lease does not abridge his authority to find that another lease, regularly executed and filed, is more to the allottee's interest and better entitled to approval. It does not appear that had he disapproved the Gunsburg lease, he would have approved the one to appellant, and, until this affirmatively appears, appellant has no standing which permits a court by its decree to award the leasehold to him.

We find nothing in this record to indicate that the Secretary of the Interior has exceeded the authority which the law vests in him. The fact that he has given reasons in the discussion of the case, which might not in all respects meet with approval, does not deprive him of authority to exercise the discretionary power with which by statute he is invested. *United States ex. rel. West* v. *Hitchcock*, 205 U. S. 80, 85, 86.

It follows that the decree of the United States Circuit Court of Appeals must be

Affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* DONALDSON, ADMINISTRATRIX OF THOMS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 172. Argued January 31, 1918.—Decided March 4, 1918.

Where the state trial and supreme courts have successively found sufficient evidence of negligence to sustain a verdict for plaintiff in an action under the Employers' Liability Act, it is not the province of this court to weigh the conflicting evidence on the subject; it will go no farther than to ascertain that there is evidence supporting the verdict.

The Federal Boiler Inspection Act, c. 103, 36 Stat. 913, is a "statute enacted for the safety of employees," within the meaning of § 4 of the Federal Employers' Liability Act, which latter eliminates assumption of risk in cases where the violation of such a statute contributes to the injury or death of the employee.

Where there was evidence tending to prove that a locomotive boiler which exploded was unsafe in that the button-heads on the bolts of the crown-sheet over the fire-box were unnecessarily large, and subject to deterioration from overheating, when oil was used for fuel; and in that the boiler was not provided with fusible safety plugs and had an accumulation of scale; *held*, that a request for an instruction stating that no safety statute was applicable, and submitting the question of assumed risk, was inconsistent with § 4 of the Employers' Liability Act and § 2 of the Boiler Inspection Act.

The court instructed to the effect that if the jury believed from a fair preponderance of the evidence that the boiler was not in the proper condition, etc., defined by § 2 of the Boiler Inspection Act, due to the defendant's negligence in any of the respects above mentioned, there would be no assumption of risk, but that if it was in such condition, but due to defendant's negligence was defective in any of such respects, and the employee had actual knowledge of such defects or they were so plainly visible that in the reasonable exercise of his faculties he should, and might be presumed to, have known them, then he assumed the risk. *Held*, more favorable to the defendant than the law required.

Testimony *held* not to show an approval by federal boiler inspectors of the use of the large type of button-head on an oil-burning engine.

When a feature of construction renders a boiler unsafe, within the definition of § 2 of the Boiler Inspection Act, the fact that it has not been disapproved by a federal inspector does not absolve the carrier from liability.

89 Washington, 161, affirmed.

THE case is stated in the opinion.

Mr. F. G. Dorety, with whom *Mr. E. C. Lindley* and *Mr. F. V. Brown* were on the briefs, for plaintiff in error.

Mr. James McCabe, with whom *Mr. Hyman Zettler* and *Mr. John C. Higgins* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Adaline Donaldson as administratrix of the estate of Vance H. Thoms, deceased, brought suit in the Superior Court of Snohomish County, Washington, under the Federal Employers' Liability Act, to recover damages for injuries received which resulted in the death of Vance H. Thoms, by reason of a boiler explosion upon one of defendant's engines upon which decedent was employed as an engineer.

The charges of negligence, in the amended complaint alleged to have resulted in the injury and death of the decedent, were: That the boiler on the engine was insufficient in that:

1. The button-heads of the crown-bolts of the boiler were excessively and unnecessarily large and consequently unduly exposed to the direct heat produced by the oil fuel used on the locomotive;

2. That the boiler was not provided with fusible safety plugs;

3. That scale was negligently allowed by defendant company, its officers and employees, to accumulate upon the crown-sheet in the boiler.

The answer of the company denied negligence, and specifically set up the defense of contributory negligence and assumed risk on the part of the deceased. In the trial court the plaintiff recovered a verdict and judgment, and the judgment was affirmed in the Supreme Court of the State of Washington. 89 Washington, 161.

The ground of reversal principally urged here is that the testimony did not warrant a recovery by the plaintiff, and when properly considered required an instruction to the jury to find a verdict in favor of the company.

An examination of the record discloses that there was testimony tending to support the allegations of negligence set forth in the amended complaint. That the engine upon which the deceased was working had been a coal-burning engine but that at the time of the explosion the fuel used in its operation was, and for some time had been, oil. That the button-heads on the bolts of the crown-sheet at the top of the fire-box (this sheet also formed the bottom of the water compartment over the fire-box) were large ones when the engine was fired with coal, and were not changed with the change of fuel from coal to oil. That these button-heads because of their size became overheated when oil was used for fuel, resulting in the deterioration and weakening of the strength of their material, and from the consequent giving away of the button-heads, the crown-sheet came down and the explosion resulted. There is also testimony tending to show that there was an accumulation of scale and a want of use of fusible plugs.

On the part of the company there was testimony tending to meet and refute that introduced by the plaintiff, and a considerable amount of testimony was introduced tending to show that the water in the boiler was too low,

thereby causing the explosion from the fault of the deceased engineer in allowing it to become so. There was testimony for the plaintiff to the effect that the water was not too low at the time of the explosion. The trial court submitted these issues to the jury, with the result that a verdict was found in favor of the plaintiff. The trial court held that there was evidence sufficient to sustain the verdict, and refused to disturb it. The Supreme Court of Washington affirmed the judgment. In this situation it is enough to say that it is not the province of this court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question.

Complaint is made that the trial court failed to give an instruction requested by the company as to assumption of risk, and as to the effect of the Federal Boiler Inspection Act.

Section 4 of the Federal Employers' Liability Act (35 Stat. 65) provides:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

That the Federal Boiler Inspection Act was enacted for the safety of employees is obvious. Section 2 of that act, 36 Stat. 913; 8 U. S. Comp. Stats. 1916, § 8631, provides:

"That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said loco-

motive and appurtenances thereto are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Counsel for the company at the trial upon assumed risk requested the following charge:

"You are instructed that even where an employer, such as a railroad company, is negligent in the construction or maintenance of its tools or equipment, such as a locomotive, yet an employee who accepts, or continues his employment, knowing of the existence of such defects or negligence, and knowing the danger therefrom, assumes the risk of the injury to himself from such defects and cannot recover if he is injured as a result of them. This would not be true in the present case, if the negligence or defects involved some violation of a United States statute, but there is no evidence of any violation of such a statute in this action, so that the rule which I have just given to you would apply in this case. Therefore, even if you find that the defendant company had been negligent in adopting an improper type of bolt, or in failing to install fusible plugs, or in some other particular in the construction or maintenance of this boiler, and even though you should also find that such negligence caused the explosion, still, the plaintiff cannot recover in this action, if you should also find that the deceased, V. H. Thoms, was familiar with the type of construction used, or the particular form of negligence involved, and knew the danger likely to arise therefrom, or if, in the exercise of a reasonable care, he should have known of these things prior to the time of his injury."

But the court charged upon this subject:

"You are instructed that the law provides that it shall be unlawful for any common carrier, as was the defendant, engaged in interstate commerce, to use any locomotive engine propelled by steam power, unless the boiler of the locomotive engine and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of said carrier in moving traffic, without unnecessary peril to life and limb; and that no employee shall be deemed to have assumed any risk of death by reason of any locomotive engine operated in violation of said law, and that no employee injured or killed by reason of a locomotive engine operated in violation of said law shall be held to have been guilty of contributory negligence.

"Therefore, if you shall believe, from a fair preponderance of all the evidence in the case, that the boiler of the locomotive engine No. 1902 or the appurtenances thereof were not in proper condition and safe to operate in the active service of the defendant in moving traffic without unnecessary peril to life or limb, by reason of the negligence of the defendant, in any one or more of the three respects alleged in the complaint, then and in that case Vance H. Thoms assumed no risk of death and was guilty of no contributory negligence, and the affirmative defenses must fail.

"However, if such boiler and appurtenances were in proper condition and safe for such use in moving traffic, but due to defendant's negligence were defective in one or more of the respects alleged in the complaint and Vance H. Thoms had actual knowledge of such defect or defects, or such defects were so plainly observable that in the reasonable exercise of his faculties he should have known of such and may be presumed to have known thereof and the dangers that surrounded him, then Vance

H. Thoms assumed the risks of injury and the plaintiff cannot recover in this action."

The charge requested is inconsistent with the provisions of § 4 of the Federal Employers' Liability Act and § 2 of the Boiler Inspection Act. As given it is enough to say that it is more favorable to the company than the law requires. See *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 241 U. S. 462, 468.

The further contention is that the effect of this charge was to leave to the jury to determine the type of boiler construction, in respect to the use of the large button-heads which are alleged to have made the engine unsafe to operate. And it is contended that there is testimony tending to show that the use of either the large or small kind of button-heads was approved by the Federal Department of Boiler Inspection. Attention is directed to the testimony of an expert witness, offered by the defendant for the purpose of showing that low water was the cause of the explosion, in which he spoke of the use of the button-heads of the larger and also of the smaller or taperhead kind, and was asked whether the United States Government made certain requirements as to how boilers and engines should be constructed, to which he answered: "No. Not as long we have the proper factor of safety." . . . "They have a factor of safety, and the factor of safety is five on the shell of the boilers; that is if we have a 200 pound pressure boiler it should stand up to a test of 1000 pounds; five to one." Asked whether the Government inspects engines and locomotives in general, he answered: "Yes, by the United States inspectors," and that there was a standard to which locomotives must be built in order to pass inspection. Asked as to the type of the crown-bolt permitted, he answered that either type is acceptable when properly applied. It is evident that this testimony, whatever might be its effect, is far from showing an approval by government inspect-

ors of the use of the large type of button-head upon an oil-burning engine.

Nor can we agree with the contention of the plaintiff in error that so long as the large button-head had not been disapproved by the government inspector such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of § 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the federal boiler inspector.

Other errors are assigned; so far as they are open here we have examined these assignments and find in none of them reason for the reversal of the judgment of the Supreme Court of Washington, and that judgment is

Affirmed.

EX PARTE SLATER, PUBLIC ADMINISTRATOR, ETC., PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 27, Original. Argued January 21, 1918.—Rule discharged March 4, 1918.

A petition for mandamus should give a correct, uncolored statement of the matter concerning which it seeks relief.

The function of mandamus, when directed to judicial officers, restated.

The right of substitution, upon the death of a party to a suit in the District Court, depends upon recognized legal and equitable principles to be judicially applied; and where, after due hearing, the motion is denied, the ruling, if erroneous, may be corrected upon appeal, but it cannot be reviewed by mandamus.

By decree in a pending suit, the District Court directed that a sum in

128. Statement of the Case.

the registry be distributed among several solicitors in proportion to their respective services in the case, past payments to be considered, and retained control of the suit and fund to make and carry out the apportionment. *Held*, that the death of one of the solicitors suspended the proceedings until someone legally capable of asserting and defending his interest could be substituted.

Substitution, formerly effected by a bill of revivor, or a bill of that nature, is now ordered upon motion under new Equity Rule 45.

Petition dismissed.

THIS is a petition for a writ of mandamus against the judge of the District Court for the Eastern District of Missouri directing the revivor in the petitioner's name of a suit in equity. The facts, about which there is no dispute, are these: In 1916 the District Court by a decree in a pending suit awarded $95,770, then in the registry of the court, to five solicitors as the balance due to them collectively for services in the suit, and directed that this sum be apportioned among them according to the relative amount and value of the services of each, due regard being had for payments already made. Control of the suit and fund was retained to enable the court to make the apportionment and carry it into effect. The solicitors appeared in the suit and while proceedings looking to an apportionment were pending one of the solicitors died. He was a resident of Texas and was survived by a widow and son, both living in that State. By his will, regularly presented for probate in Texas, his entire estate, excepting one dollar bequeathed to the son, was devised and bequeathed to the widow, and she was named as sole executrix. The will was what is known under the laws of Texas as an "independent" will, the same containing a direction that no action should be had thereunder other than to probate it and to return an inventory and appraisement. See Tex. Civ. Stats., 1914, Art. 3362, *et seq.* After the will was presented and while it was awaiting probate in regular course the court in Texas appointed the widow

temporary administratrix and directed her in that capacity to take charge of the estate and do whatever was necessary to obtain the deceased's portion of the fund awaiting distribution in the District Court. She qualified as temporary administratrix and as such presented in the suit a motion asking that it be revived by substituting her as a party in the place of the deceased. A few days later the public administrator of St. Louis, Missouri, acting under an order of the probate court of that city, presented in the suit a motion, erroneously styled an intervening petition, asserting that he was the deceased's only legal representative in Missouri and insisting in effect that the revivor be in his name.

These conflicting motions were heard together, were argued orally and in elaborate briefs by counsel for the respective applicants for substitution, and were considered in a memorandum opinion wherein the judge, after indicating that a revivor was essential and that the question for decision was as to which of the two applicants was the proper party to be substituted in the place of the deceased, reached the conclusion that the revivor should be in the name of the widow as temporary administratrix. An order was accordingly entered granting her motion and denying that of the public administrator. That order was dated October 29, 1917.

November 6, 1917, the will was regularly admitted to probate in Texas, and the judgment by which this was done contained an express finding that there was no debt to be paid and no occasion for administration upon the estate. The widow then presented in the suit a motion setting up the probate of the will with the finding made in that connection and insisting that this and the terms of the will operated under the laws of Texas [1] to invest

[1] The reference evidently was to Article 3362, *supra*, and to Article 3235, which declares, "When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immedi-

her in her individual capacity with the full right, title and interest of the deceased in the fund as of the date of his death. The motion concluded by asking for an order recognizing and substituting her in her individual right as the successor in interest and title of the deceased. A hearing was had upon this motion and the same was granted November 19, 1917.

That was the date on which this court, after examining the present petition of the public administrator, granted leave to file the same and ordered that a rule to show cause issue against the defendant judge.

Mr. George E. Webster, with whom *Mr. Wells H. Blodgett*, *Mr. Henry W. Blodgett* and *Mr. Walter N. Fisher* were on the briefs, for petitioner:

The peremptory writ of mandamus should issue as prayed because the petitioner has no remedy by appeal. *In re Connaway*, 178 U. S. 421; *Guion* v. *Liverpool Ins. Co.*, 109 U. S. 173; *Ex parte Cutting*, 94 U. S. 14; *Ex parte Russell*, 13 Wall. 664; *Life and Fire Ins. Co.* v. *Wilson*, 8 Pet. 291. The order denying his application for leave to intervene is not such a recognition of his status as a party to enable him to appeal. *Ex parte Cutting, supra.*

The interest of the decedent in the undistributed fund constituted assets subject to administration in Missouri. *United States* v. *Tyndale*, 116 Fed. Rep. 820.

The mere fact that in denying the petitioner's application for leave to file an intervening petition the respondent was acting judicially does not defeat a resort to mandamus. *In re Connaway, supra; Ex parte Breedlove*, 118 Alabama, 172; *Reynolds* v. *Clark*, 95 Alabama, 570; *Wood* v. *Lewanee*, 84 Michigan, 521; Merrill, Mandamus, § 186. Where a

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ately in the devisees or legatees," but shall be "subject in their hands to the payment of the debts," if any, of the testator. And see *Wilkins* v. *Ellett*, 108 U. S. 256, 258; also *Owings* v. *Hull*, 9 Pet. 607, 625, and *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751.

person desires to intervene to lay claim to a fund in court and shows a *prima facie* right, the refusal to admit him as a party is an abuse of discretion which may be corrected by mandamus.

Mr. Jacob Chasnoff, with whom *Mr. Daniel G. Taylor* and *Mr. George C. Willson* were on the brief, for respondent:

The interest claimed by petitioner is technical, not substantial, the widow being the real party in interest.

The granting or denying of permission to intervene is generally within the discretion of the lower court, and this case is not within any exception to that rule. *People* v. *Sexton*, 37 California, 532; *Moon* v. *Welford*, 84 Virginia, 34; *White* v. *United States*, 1 Black, 501.

The question of whether the claim of decedent had a *situs* in Missouri was a judicial question with the determination of which by respondent this court will not interfere by mandamus. *Lee* v. *Abdy*, 17 Q. B. Div. 309, 312; *Guillander* v. *Howell*, 35 N. Y. 657, 661; *Jones* v. *Merchants National Bank*, 76 Fed. Rep. 683; *Wilson* v. *Bell*, 20 Wall. 201.

The question of the authority of petitioner to take charge of the cause of action was a judicial question and the result reached by respondent was not an abuse of his judicial discretion.

Mandamus cannot be used to take the place of an appeal or writ of error, even though no appeal or writ of error is given by law. *In re Rice*, 155 U. S. 396; *Crocker* v. *Supreme Court Justices*, 208 Massachusetts, 162, 164; *In re Key*, 189 U. S. 84, 85.

Mr. Justice Van Devanter, after making the foregoing statement, delivered the opinion of the court.

It now appears that the petition gives an inadmissible coloring to the matter in respect of which it seeks relief. We say this because the petition implies that the court

did not consider but summarily rejected the public administrator's motion for a revivor in his name, whereas in fact the court heard oral argument on the motion, gave time for filing and received briefs thereon, and ultimately denied the motion for reasons given in a memorandum opinion. The petition makes no reference to this; neither does it mention the conflicting motion by the temporary administratrix which was heard at the same time, dealt with in the same memorandum opinion and granted by the same order that denied the public administrator's motion. These matters and the subsequent proceedings are all brought to our attention by the return, the accuracy of which is not questioned.

When the unwarranted coloring of the petition is put aside and what actually was done is considered in its true light, it is manifest that the situation is not one in which a writ of mandamus will lie.

Of course, the death of one of the parties having an interest in the fund operated to suspend the proceedings for its apportionment until some one legally capable of asserting and defending that interest should either come or be brought into the suit in the place of the deceased. Formerly such a substitution was effected through a bill of revivor or a bill of that nature, 210 U. S. 526, Rule 56; Story's Equity Pleadings, 9th ed., §§ 354, 356, 364; but the new Equity Rules provide that the court may, "upon motion, order the suit to be revived by the substitution of the proper parties." 226 U. S. 661, Rule 45. Whether a particular applicant for substitution is the proper party is a question for the court to determine, just as is the question whether a particular suit is brought by or against the proper party. In either case the question is to be resolved by applying recognized legal and equitable principles to the facts in hand; in other words, by an exercise of the judicial function. If the suit be one which may be revived, as where the cause of action or claim in contro-

versy survives, revivor in the name of the proper party is a matter of right, and, if it be denied, the denial may be reviewed and corrected upon appeal. *Clarke* v. *Mathewson*, 12 Pet. 164; *Terry* v. *Sharon*, 131 U. S. 40, 46; *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315–316; *Mackaye* v. *Mallory*, 79 Fed. Rep. 1, 2; *Minot* v. *Mastin*, 95 Fed. Rep. 734, 739; *United States Trust Co.* v. *Chicago Terminal Co.*, 188 Fed. Rep. 292, 296; *Western Union Telegraph Co.* v. *United States & Mexican Trust Co.*, 221 Fed. Rep. 545, 552.

When the two conflicting motions for revivor were presented it devolved upon the court to consider and decide which, if either, of the applicants was entitled to substitution. A full hearing was had and in regular course the court ruled that one applicant was and the other was not the proper party, and then entered an order reviving the suit accordingly. That was a judicial act done in the exercise of a jurisdiction conferred by law, and even if erroneous, was not void or open to collateral attack, but only subject to correction upon appeal.

"The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal." *Ex parte Roe*, 234 U. S. 70, 73; *In re Rice*, 155 U. S. 396, 403; *In re Key*, 189 U. S. 84; *Ex parte Park Square Automobile Station*, 244 U. S. 412.

Upon the present petition therefore we cannot consider the merits of the ruling upon the conflicting motions or the relative bearing of the subsequent proceedings whereby the widow in her individual right was substituted as the successor in interest and title of the deceased.

Rule discharged; petition dismissed.

INTERNATIONAL PAPER COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 733. Argued October 19, 1917.—Decided March 4, 1918.

The principles laid down in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, and other cases, limiting the power of a State in respect of license fees or excise taxes imposed on foreign (sister state) corporations doing interstate as well as local business, are restated and reaffirmed.

A license fee or excise of a given per cent. of the par value of the entire authorized capital stock of a foreign corporation doing both local and interstate business and owning property in several States, tested, as it must be, by its essential and practical operation rather than by its form or local characterization, is a tax on the entire business and property of the corporation, and is unconstitutional and void, both as an illegal burdening of interstate commerce, and as a deprivation of property without due process of law.

The immunity of interstate commerce from state taxation is universal and covers every class of such commerce, including that conducted by merchants and trading companies no less than what is done by common carriers.

As respects the power of a State to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a State is wholly without power to impose such a tax.

Massachusetts Stats., 1914, c. 724, § 1, as construed by the Supreme Judicial Court, removed the maximum limit fixed by Stats., 1909, c. 490, Pt. III, § 56, so that the two conjointly exact a single tax based on the par value of the entire authorized capital stock of the foreign corporation, of 1/50 of 1% of the first $10,000,000, and 1/100 of 1% of the excess. *Held*, that, so changed, the law in its essential and practical operation is like those held invalid in *Western Union Telegraph Co.* v. *Kansas*, *supra*, and other cases cited, including *Looney* v. *Crane Co.*, 245 U. S. 178; and that a tax exacted under it for the privilege of doing local business, from a foreign corporation largely engaged in interstate commerce, and

whose property and business were largely in other States, was void. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, distinguished. 228 Massachusetts, 101, reversed.

THE case is stated in the opinion.

Mr. Charles A. Snow, with whom *Mr. Frank T. Benner* and *Mr. William P. Everts* were on the brief, for plaintiff in error. See *post*, 149.

Mr. William Harold Hitchcock, Assistant Attorney General of the State of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the State of Massachusetts, was on the brief, for defendant in error.

As plaintiff in error could not complain of the original tax, the only question raised by this record is whether Stats., 1914, c. 724, by increasing the amount by 1/100 of 1% of its authorized capital exceeding ten million dollars, namely, by the amount of $3,500, turns the excise, so far as this corporation is concerned, into an unconstitutional exaction, either in whole or in part.

In *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, this court adopted the conclusion that the original tax imposed by the Statute of 1909 was not a property tax but an excise, in the determination of which the authorized capital of the corporation is used only as a measure (pp. 84, 87). This measure the court stated to be "in itself lawful, without the necessary effect of burdening interstate commerce." Obviously, the additional tax imposed by the new statute is of precisely the same character. As the plaintiff in error is conducting a purely local business separable from its interstate commerce, and as it is thus within the power of Massachusetts to impose an excise upon it, for the privilege of engaging in that business, to be measured by its authorized capital stock, it necessarily follows that the whole authorized capital may be so used in all cases without reference to the amount. We must assume that we are dealing with a

subject of taxation entirely within the power of the State; otherwise, the corporation would not be subject to the original limited excise tax.

The Statute of 1914 thus has to do merely with the amount of the tax in cases which admittedly come within the power of the State to tax to some extent. That in such cases a tax may be levied at a given percentage of the entire authorized capital stock of a corporation, without reference to where its property is located or whether such property is within the jurisdiction of the State or not, is well established by the decisions of this court. *Pembina Consolidated Silver Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 186; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 314, 315, 317; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City &c. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Pick & Co.* v. *Jordan*, 169 California, 1, 244 U. S. 647; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Society for Savings* v. *Coite*, 6 Wall. 594; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107; *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Co.*, 191 U. S. 171.

The foregoing decisions and many others cited therein plainly demonstrate that, if a State may impose a tax upon a given subject of taxation, it may increase that tax to the fullest extent permitted by its constitution.

It was early recognized that "the power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 4 Wheat. 316, 431. And this necessary consequence of the existence of the right to tax is the real basis of many of the limitations which this court has held were placed by the Federal Constitution on the powers of the States. It was on this ground that it was held that a State cannot to any extent, no matter how slight, impose a tax upon any activities of the Federal Government. This also was essentially the doctrine on which the power of the States to tax interstate commerce was denied.

It necessarily follows from this doctrine that, if a subject-matter of state taxation plainly exists, the State unless forbidden by its own constitution may tax that subject-matter to the point of destruction. If a corporation engaged in interstate commerce is also conducting a local business "real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon interstate business" (*Baltic Mining Co.* v. *Massachusetts*, at p. 86), a State has power to tax this business to the fullest extent, even to the extent of compelling the corporation to give it up. *Pullman Co.* v. *Adams*, 189 U. S. 420, 422. This was plainly recognized by this court in *Allen* v. *Pullman Co.*, 191 U. S. 170, 181.

The additional tax imposed upon the plaintiff in error by the Statute of 1914 does not upon the particular facts of this case have the necessary effect of burdening its interstate commerce.

The tax does not deny to the plaintiff in error the equal protection of the laws. It has acquired no permanent property within the Stat ; there has been no discrimination against it in the increase of its tax.

Mr. Malcolm Donald, by leave of court, filed a brief as *amicus curiæ*, attacking the .w of 1914.

Mr. Justice Van Devanter delivered the opinion of the court.

This is a suit by a New York corporation to recover the amount of an excise tax assessed against it in Massachusetts for the year 1915 and paid under protest, the right of recovery being predicated on the asserted invalidity of the tax under the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. The tax is also assailed on other grounds which will be passed without particular notice. The case is set forth in an agreed statement, in the light of which

the state court has sustained the tax. 228 Massachusetts, 101. The Massachusetts statutes under which the tax was imposed are as follows:

St. 1909, c. 490, Part III, § 56. "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

St. 1914, c. 724, § 1. "Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

The facts shortly stated are these: The company, as before indicated, is a New York corporation. Its authorized capital stock, on which the tax was computed, is $45,000,000. Its total assets are not less than $39,000,000 or $40,000,000, of which not more than 1¾ per cent. are located or invested in Massachusetts. Its authorized and actual business is manufacturing and selling paper, in which connection it operates 23 paper mills,—1 in Massachusetts and 22 in other States. The output of its mills is sold by it in both interstate and intrastate commerce, principally the former. In Massachusetts it maintains a selling office where two salesmen, with a bookkeeping and clerical force, negotiate sales of a part of the

output to consumers in the New England States, subject to the approval of the home office in New York. About 86 per cent. of the sales negotiated through this selling office are in interstate commerce and the remainder are local to Massachusetts. The sales are made largely through long-term contracts with proprietors of newspapers whereby the company engages to supply their needs from its mills and from the output in transit at the time. No stock of goods is kept on hand in Massachusetts from which current sales are made. The executive and financial offices of the company are in New York, and none of its corporate or business activities are carried on in Massachusetts save as is here indicated. It pays local property taxes in Massachusetts on its real and personal property located there. In 1915 the assessed value of such property was $472,000 and the tax paid thereon was $8,118. The tax in question was in addition to the property tax and amounted to $5,500. It was imposed, so the state court holds, as an annual excise for the privilege of doing a local business within the State.

While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the "maximum limitation" put on the tax by the part first enacted "is removed" by the other, but treats the two parts as exacting a single tax based on the par value of "the entire authorized capital" and computed as to ten million dollars thereof at the rate of one fiftieth of one per cent. and as to the excess at the rate of one one hundredth of one per cent.

Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. In disposing of these

questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy.

The subject was extensively considered in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. A statute of Kansas was there in question. As construed by the state court, it required a foreign corporation doing an interstate and local business in that and other States to pay a license fee or excise of a given per cent. of its authorized capital for the privilege of conducting a local business in that State. After reviewing the earlier decisions this court pronounced the statute invalid as being repugnant to the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. In that and two other cases (*Pullman Company* v. *Kansas*, 216 U. S. 56, and *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146), which were before the court at the same time, it was held:

1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from

taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.

True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a State to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a State is wholly without power to impose such a tax.

Our last decision on the subject was given during the

present term in *Looney* v. *Crane Company*, 245 U. S. 178. The case was orally argued a second time at our request and was much considered. It involved the validity of a Texas statute which, as construed by the state court of last resort, required a foreign corporation as a condition to engaging in local business in that State to pay a permit tax based on its entire authorized capital and a franchise tax based on its outstanding capital plus its surplus and undivided profits. The foreign corporation complaining of these taxes was a manufacturing and trading company extensively engaged in interstate and local commerce, principally the former, in several States, including Texas. It maintained an agency in that State and had a large supply depot at one point therein and a warehouse at another. Of its gross sales and receipts for the year preceding the suit not more than 2½ per cent.—$1,019,750—had any relation to Texas and of this approximately one-half was interstate in character. The assessed value of its property in the State was $301,179, upon which it paid the usual *ad valorem* tax.

Applying what was held in *Western Union Telegraph Co.* v. *Kansas*, *supra*, and the two other cases before cited, this court unanimously pronounced the Texas statute invalid as placing "direct burdens on interstate commerce" and taxing "property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction." Then turning to *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227, and *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, which were relied on as practically overruling *Western Union Telegraph Co.* v. *Kansas* and kindred cases, the court pointed out that the former contained express statements that they were not intended to limit the authority of the latter, and further said of the former, p. 189:

"In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, that 'The substance and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable."

That case and those which it followed and reaffirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable.

In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Mining Co.* v. *Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney* v. *Crane Company.* True, the tax sustained in *Baltic Mining Co.* v. *Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax which, as shown in that and other cases, was a material factor in the decision. This limitation, as the state court holds, was "removed" by the statute of 1914, which also made a partial reduction in the tax rate. Since then the tax has been assessed on the par value of "the entire authorized capital" at one fiftieth of one per cent. up to $10,000,000 and at one one hundredth of one per cent. for the excess. Accepting the state court's view of the change wrought by the later statute, it is apparent that since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid in 1910 in *Western Union Telegraph Co.* v. *Kansas; Pullman Co.* v. *Kansas,* and *Ludwig* v. *Western Union Telegraph Co.,* and like that held invalid at the present term in *Looney* v. *Crane Company.*

What has been said sufficiently shows that the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the State.

Judgment reversed.

LOCOMOBILE COMPANY OF AMERICA *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 734. Argued October 19, 1917.—Decided March 4, 1918.

An excise tax of a designated per cent. of entire authorized capital, imposed on a foreign corporation for the privilege of doing local business in Massachusetts, *held*, void, upon the authority of *International Paper Co.* v. *Massachusetts*, *ante*, 135, and cases there cited. 228 Massachusetts, 117, reversed.

THE case is stated in the opinion.

Mr. Charles A. Snow, with whom *Mr. Frank T. Benner* and *Mr. William P. Everts* were on the brief, for plaintiff in error.

Mr. William Harold Hitchcock, Assistant Attorney General of the State of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the State of Massachusetts, was on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

An excise tax of $1,300 imposed on a West Virginia corporation for doing a local business in Massachusetts during the year 1915 is here in question. The state court sustained it. 228 Massachusetts, 117. The corporation is engaged in manufacturing in Connecticut and sells its manufactured articles extensively in interstate commerce. It does both an interstate and a local business in Massachusetts. Each is of considerable volume, but the inter-

state is much the larger, although this is not material. The tax is of a designated per cent. of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, Part III, § 56, was removed by St. 1914, c. 724, § 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, and *Looney* v. *Crane Company*, 245 U. S. 178. This we have just decided in *International Paper Co.* v. *Massachusetts*, *ante*, 135.

Judgment reversed.

CHENEY BROTHERS COMPANY ET AL. *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 12. Argued April 20, 1916; restored to docket for reargument May 21, 1917; reargued October 19, 1917.—Decided March 4, 1918.

Massachusetts Stats., 1909, c. 490, Pt. III, § 56, imposed an annual excise upon every foreign corporation, for the privilege of doing local business, of 1/50 of 1% of the par value of its authorized capital stock, subject, however, to a maximum limit of $2,000.00. *Held*, valid, as applied to corporations doing local as well as interstate business, upon the authority of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68. *International Paper Co.* v. *Massachusetts*, *ante*, 135, distinguished.

The following activities are *held* to constitute local business, affording bases for the tax:

1. Keeping up a stock of repair parts at a place of business, and supplying and selling them, in part locally, to users of machines made by the corporation in another State and sold in interstate commerce. Case of *Lanston Monotype Co.*

2. Repairing automobiles made in another State and disposed of in interstate commerce, and selling second-hand automobiles taken in exchange for new ones so disposed of. Case of *Locomobile Co. of America.*

3. Where a corporation, to promote local trade in its product manufactured in another State and sold in interstate commerce to wholesalers, maintained a local office with agents who solicited orders from local retailers and turned them over to local wholesalers, who filled them and were paid by the retailers. Case of *Northwestern Consolidated Milling Co.*

4. Where a holding company had an office in the taxing State, pursuant to its articles, where it held stockholders' and directors' meetings, kept corporate records and accounts, received and deposited in bank regular dividends, and paid the money, less salaries and expenses, regularly as dividends to its stockholders. Case of *Copper Range Co.*

5. Maintaining a local office, pursuant to corporate articles, where proceeds of operations in another State are received, deposited locally, distributed to shareholders, less salaries and expenses, and where directors hold their regular meetings, elect officers and manage the general business of the corporation. Case of *Champion Copper Co.*

The fact that a local business stimulates interstate business and that its abandonment would have the opposite effect, does not make it any the less local. Case of *Locomobile Co. of America.*

Where a foreign corporation maintains and employs a local office, with a stock of samples and a force of office and traveling salesmen, merely to obtain orders locally and in other States, subject to approval by its home office, for its goods to be shipped directly to the customers from its home State, the business is part of its interstate commerce and not subject to local excise taxation. Case of *Cheney Brothers Co.* And the action of such office in obtaining orders from customers residing in the home State of the corporation and in transmitting them to the home State where they are approved and filled, is interstate intercourse, not local business in the State where the office is established. *Id.*

A State may impose a different rate of taxation upon foreign corporations for the privilege of doing local business than it imposes upon the primary franchises of its own corporations; and, by merely permitting or licensing a foreign corporation to engage in local business and acquire local property, it does not surrender or abridge, *quoad*

such corporation, its power to change and revise its taxing system and tax rates. Hence, where a foreign corporation acquired real property and specially improved it at large cost, but still the property was such that the investment might be retrieved if need be, *held*, that a subsequent increase in its excise without corresponding change in the tax bearing on domestic corporations would not deny it the equal protection of the laws. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, distinguished. Case of *White Co.*

218 Massachusetts, 558, reversed in part and affirmed in part.

THE case is stated in the opinion.

Mr. Charles A. Snow, with whom *Mr. William P. Everts* was on the briefs, for plaintiffs in error:

A "fluctuating" percentage excise measured by the entire capital stock of a foreign corporation engaged in transacting interstate and domestic commerce at the same places and through the same instrumentalities, is unconstitutional under the commerce clause and void, although it professes to be imposed exclusively for the privilege of transacting local business. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165; *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280; *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 163; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Kansas City &c. R. R. Co.* v. *Stiles*, 242 U. S. 111; *Pick & Co.* v. *Jordan*, 169 California, 1, 244 U. S. 647; *Crane Co.* v. *Looney*, 218 Fed. Rep. 260.

The principles of the *Western Union Cases* were not confined to *quasi*-public corporations, but extended broadly to all classes of trading corporations conducting conjointly both interstate and domestic commerce at the same places and through the same instrumentalities. *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 86; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 234, 235. They did not decide that only indispensable and

inseparable incidents to interstate commerce are protected; nor that such an excise is constitutional if the company may voluntarily abandon its local business without serious damage to its interstate commerce; nor that a direct burden on such commerce must be shown. They require only a burden. If the necessary operation and effect is to burden interstate commerce, it is unconstitutional.

The *Western Union* decisions were not distinctly and consciously placed upon the ground that the tax was a fluctuating percentage tax, but the Kansas tax was in fact such.

Baltic Mining Co. v. *Massachusetts*, *supra*, did not modify these principles, but was decided upon its special facts; for the court found that the Baltic Company did not, like the Western Union Company, conduct interstate and domestic business at the same places and through the same instrumentalities. As applied to the Baltic Company, the Massachusetts statute was sustained. Here the facts, as applied to the present companies, are totally different, although the statute is the same. No attempt was made in the *Baltic Case* to differentiate the terms of the Kansas and Massachusetts statutes. Nor could any substantial distinction have been established, because of the fact that other companies not then before the court were totally exempted from taxation beyond a $2,000 excise, representing 1/50 of 1% on a capitalization of ten million dollars. The companies there under consideration were subjected to a "fluctuating" percentage tax, increasing in exact proportion to every dollar of additional capital used in or required for extensions of interstate business. The Kansas and Massachusetts statutes being identical in all material respects, the *Baltic* decision must rest upon its special facts. The vital fact there appearing was, as stated by the court, that each of the corporations in question was carrying on a purely local and

domestic business quite separate from its interstate transactions. It clearly did not profess to hold that, while a "fluctuating" tax is bad, if without limits, it is valid, if within a maximum which had not been reached by any company before the court, and which can be attained only by the largest companies. Nor was the decision at all based on the consideration that two thousand dollars is a small amount or that it is a reasonable tax. [Discussing and explaining *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227.]

Although the Massachusetts excise, as applied to the present companies, is condemned by the *Western Union* decisions, the same result would follow under the earlier cases. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Allen* v. *Pullman Co.*, 191 U. S. 171.

The amount of an excise of this description must bear some fair and reasonable relation to the value of the privilege of conducting local business, and be levied upon some reasonable basis. *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 348; *Fargo* v. *Hart*, 193 U. S. 490; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 42; *Marconi &c. Co.* v. *Commonwealth*, 218 Massachusetts, 558, 567.

An excise which operates with inequality because of its improper basis is unreasonable and void under the commerce clause.

All fair and reasonable incidents to, and all instrumentalities of, interstate commerce are protected equally with the commerce itself. They need not be indispensable, reasonably necessary, or inseparable incidents or instrumentalities, as required by the court below. Local offices and agents used for interstate commerce thus are protected, whether they are indispensable or not. *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Western Union Cases, supra; Rearick* v. *Pennsylvania*, 203 U. S. 507;

Stockard v. *Morgan*, 185 U. S. 27; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Crenshaw* v. *Arkansas*, 227 U. S. 389.

The Massachusetts excise denies equal protection to the White Company, within the doctrine of *Southern Ry. Co.* v. *Greene*, 216 U. S. 400.

It denies equal protection of the laws to all the smaller and poorer corporations having a capitalization less than ten million dollars, because they are discriminated against by the exemption from taxation of capital beyond that amount. It violates the due process clause.

Mr. William Harold Hitchcock, Assistant Attorney General of the State of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the State of Massachusetts, was on the briefs, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

We here are concerned with an excise tax imposed by Massachusetts in 1913 on each of seven foreign corporations on the ground that each was doing a local business in the State. Objections to the tax based on the commerce clause of the Constitution and the due process and equal protection clauses of the Fourteenth Amendment were overruled by the state court. 218 Massachusetts, 558. The tax was imposed under St. 1909, c. 490, Part III, § 56, before the maximum limit was removed by St. 1914, c. 724, § 1, and in that respect the case is like *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, and unlike *International Paper Co.* v. *Massachusetts*, *ante*, 135. Whether in other respects it is like *Baltic Mining Co.* v. *Massachusetts* is the matter to be determined, and this requires that the business done by each of the seven corporations be considered.

CHENEY BROTHERS COMPANY

This is a Connecticut corporation whose general business is manufacturing and selling silk fabrics. It maintains in Boston a selling office with one office salesman and four other salesmen who travel through New England. The salesmen solicit and take orders, subject to approval by the home office in Connecticut, and it ships directly to the purchasers. No stock of goods is kept in the Boston office, but only samples used in soliciting and taking orders. Copies and records of orders are retained, but no bookkeeping is done, and the office makes no collections. The salesmen and the office rent are paid directly from Connecticut and the other expenses of the office are paid from a small deposit kept in Boston for the purpose. No other business is done in the State.

We do not perceive anything in this that can be regarded as a local business as distinguished from interstate commerce. The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. *McCall* v. *California*, 136 U. S. 104; *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Rogers* v. *Arkansas*, 227 U. S. 401. Nor is the situation changed by inferring, as the state court did, that orders from customers in Connecticut sometimes are taken by salesmen connected with the Boston office and, after transmission to and approval by the home office, are filled by shipments from the company's mill in Connecticut to such customers. In such cases it doubtless is true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of

the nature of interstate intercourse than of business local to Massachusetts and affords no basis for an excise tax in that State. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 106–107. We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause.

Lanston Monotype Company

This is a Virginia corporation which makes typesetting machines in Philadelphia and sells them in interstate commerce. It has a place of business in Massachusetts where it keeps on hand a stock of the several parts of its machines likely to be required for purposes of repair. The stock is replenished weekly and the parts are sold extensively to those who use the machines in that and adjacent States.

It is apparent, as we think, that a considerable portion of the business of selling and supplying the repair parts is purely local and subject to local taxation.

Locomobile Company of America

This West Virginia corporation conducts an automobile factory in Connecticut and sells its automobiles in interstate commerce. It does an extensive local business in Massachusetts in repairing cars of its own make after they are sold and in use, and also in selling second-hand cars taken in partial exchange for new ones. This local business has some influence on the volume of interstate business done by the company in the State, and its abandonment would tend to reduce the purchases there of the company's automobiles. But this does not make it any the less a local business. It must be judged by what it is rather than by its influence on another business. See *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444–445.

NORTHWESTERN CONSOLIDATED MILLING COMPANY

This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the State, regardless of the motive with which it is conducted.

COPPER RANGE COMPANY

This is a Michigan corporation whose articles of association contemplate that it shall have an office in Boston. It is a holding company and owns various corporate stocks and bonds and certain mineral lands in Michigan. Its activities in Massachusetts consist in holding stockholders' and directors' meetings, keeping corporate records and financial books of account, receiving monthly dividends from its holdings of stock, depositing the money in Boston banks and paying the same out, less salaries and expenses, as dividends to its stockholders three or four times a year. The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected.

CHAMPION COPPER COMPANY

This is another Michigan corporation which maintains an office in Boston pursuant to a provision in its articles of association. It deposits the proceeds of its mining and

smelting business in Michigan in Boston banks and, after paying salaries and expenses, distributes the balance in dividends from its Boston office. The management of its mine is under the control of a general manager in Michigan and he in turn is under the control of the company's directors. The meetings of the latter, which occur several times in a year, are held in the Boston office. At these meetings the directors receive reports from the treasurer and general manager, vote dividends, elect officers, and authorize the execution of deeds and the like for lands in Michigan. These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State.

WHITE COMPANY

This is an Ohio corporation which is conducting a business, conceded to be local, in Massachusetts. On being admitted to do business therein it acquired two pieces of land in Boston and at large cost specially improved and adapted them for use, the one as an automobile service station and the other as a garage. A subsequent change in the statute made the excise tax more onerous than before, without, as it is said, any corresponding change being made in the law relating to domestic corporations. In these circumstances the company insists that by the imposition of the tax, as defined in the statute of 1909, it is denied the equal protection of the laws, and it relies on *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. In overruling this objection the state court said, 218 Massachusetts, 579:

"The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance and operation is a widespread business in which large amounts of capital

are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The *Greene Case* related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, 'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. . . . The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed.'"

Assenting, as we do, to what was thus said, it suffices to add, first, that a State does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that " a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants in creating them." *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, 118.

Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, which was before the maximum limit was removed, it follows from our decision in *Baltic Mining Co.* v. *Massachusetts* that the several objections based on the Constitution of the United States are all

untenable, save in the instance of the Cheney Brothers Company. The tax on that company, as before indicated, was a tax on interstate business and therefore void under the commerce clause.

Judgment reversed as to Cheney Brothers Company and affirmed as to the other plaintiffs in error.

STATE OF ARKANSAS *v.* STATE OF TENNESSEE.

IN EQUITY.

No. 4, Original. Argued October 9, 1917.—Decided March 4, 1918.

When two States of the Union are separated by a navigable stream, their boundary being described as "a line drawn along the middle of the river," or as "the middle of the main channel of the river," the boundary must be fixed (by the rule of the "thalweg") at the middle of the main navigable channel, so that each State may enjoy an equal right of navigation. *Iowa* v. *Illinois*, 147 U. S. 1.

Following this principle, the court holds that the true boundary line between the States of Arkansas and Tennessee is the middle of the main channel of navigation of the Mississippi, as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

Certain decisions of the Arkansas and Tennessee courts and acts of the Tennessee legislature, referred to in the opinion, fall short of showing that the States, by practical location and long acquiescence, established the boundary, at the place in dispute, as a line equidistant from the well-defined permanent banks of the river. It is therefore unnecessary to decide whether the supposed agreement between them would be valid without consent of Congress, in view of the third clause of Art. I, § 10, of the Constitution.

Where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes

known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

This rule applies to a navigable stream between States; the boundary is not changed by an avulsion but remains as it was before, the center line of the old main channel of navigation.

The common-law doctrine permitting the private owner of land which has been submerged in the sea to regain it, upon identification after a subsequent reliction, is but an exception to the general rule giving to the sovereign land uncovered by sudden recession of the sea; it has no proper bearing upon the rule stated with reference to boundary streams; and affords no basis for restoring such a boundary, after an avulsion, to its pristine location and thus eliminating the shifting effects of erosions and accretions which occurred before the avulsion took place.

After an avulsion, so long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant the effect of these processes is at an end; the boundary then becomes fixed at the middle of the channel, as above defined, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.

How the land that emerges on either side of a navigable interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

Arkansas is not affected by judicial determinations involving the boundary in cases to which she was not a party.

The court will appoint a commission to run, locate and designate the boundary line between the two States at the place in question, in accordance with the principles herein stated.

The nature and extent of the erosions and accretions that occurred in the old channel prior to the avulsion here involved, and the ques-

tion whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

THIS is an original suit in equity brought by the State of Arkansas against the State of Tennessee for the purpose of determining the location of the boundary line between those States along that portion of the bed of the Mississippi River that was left dry as the result of an avulsion which occurred March 7, 1876, when a new channel was formed known as the "Centennial Cut-off."

The cause, having been put at issue by the filing of answer and replication, was brought on to hearing upon stipulated facts, pursuant to an intimation made by this court in *Cissna* v. *Tennessee*, 242 U. S. 195, 198.

The facts are as follows: By the Treaty of 1763 between England, France, and Spain, Art. VII (3 Jenkinson's Treaties, 177, 182), the boundary line between the British and French possessions at this place was established as "a line drawn along the middle of the River Mississippi," with consequent recognition of the dominion of France over the territory now comprising the State of Arkansas, and the dominion of Great Britain over that now comprising the State of Tennessee. By the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, the territory comprising Tennessee passed to the United States, its westerly boundary being described (Art. II) as "a line to be drawn along the middle of the said River Mississippi." It formed a part of the State of North Carolina. In the year 1790 North Carolina ceded it to the United States (Act of April 2, 1790, c. 6, 1 Stat. 106). In a report made in the following year by Thomas Jefferson, then Secretary of State, and submitted to Congress by President Washington, the bounds of the ceded territory were described, the western boundary being "the middle of the

river Mississippi." 1 American State Papers, Public Lands, p. 17. And by Act of June 1, 1796, c. 47, 1 Stat. 491, the whole of the territory thus ceded was made a State. By the Louisiana Purchase, under the Treaty of April 30, 1803, 8 Stat. 200, the territory comprising Arkansas was acquired by the United States from France. It was admitted into the Union as a State by Act of June 15, 1836, c. 100, 5 Stat. 50, its easterly boundary being described as "the middle of the main channel of the said river."

According to the stipulated facts, the earliest evidence concerning the location of the river at the place in question relates to the year 1823, and is set forth upon a map made recently by Major Humphreys, purporting to show the conditions as they existed at that time. The river flowed southward past Dean's Island on the Arkansas side, made a bend to the westward at or about the southernmost part of this island, and then swept northerly and westerly around Island No. 37 (Tennessee), a lesser channel known as McKenzie Chute passing between that island and the main Tennessee shore; the main and lesser channels met at the southwestern extremity of Island No. 37, and the river flowed thence southwesterly past Point Able, Tennessee, opposite which it turned again easterly and then northerly, forming what is known as the Devil's Elbow, and flowed thence easterly or northeasterly around Brandywine Point or Island (Arkansas), until it came within a distance of about two miles from the place where it started its northerly turn opposite Dean's Island; and at this point it turned again to the southward. It is agreed that in 1823 the river ran substantially as indicated upon the Humphreys map, and that between that year and the year 1876 the width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island, along the mainland and Island No. 37, had increased from its former width of about a

mile or less to a width of 1¼ or 1½ miles, with consequent narrowing of the neck of land opposite Dean's Island. It is a matter in controversy between the parties whether during the same period there were accretions to Dean's Island and Plum Island, in the State of Arkansas, and to Island No. 37 and the shore below Point Able, on the Tennessee side. A steamboat reconnaissance of the river was made by Colonel Suter under the direction of the War Department in 1874, and a map of the place in question was prepared under his direction and is in evidence. There being no proof of material changes in the river between 1874 and 1876, this map, while not shown to be entirely accurate, is agreed to represent the general situation as it existed in the latter year.

On March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, so that the old channel around the bend of the elbow (a distance of fifteen to twenty miles) was abandoned by the current, and although it remained for a few years covered with dead water it was no longer navigable except in times of high water for small boats, and this continued only for a short time, since the old bed immediately began to fill with sand, sediment, and alluvial deposits. In the course of time it became dry land suitable for cultivation and to a considerable extent covered with timber. The new channel is called, from the year in which it originated, the "Centennial Cut-off," and the land that it separated from the Tennessee mainland goes by the name of "Centennial Island."

The cut-off and the territory affected by it are the same that are mentioned and dealt with in the cases of *Stockley* v. *Cissna*, 119 Fed. Rep. 812; *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47, and *Stockley* v. *Cissna*, 119 Tennessee, 135. The State of Tennessee, in her answer, pleads and relies upon the first and second of these cases as judicial

determinations and evidence of the boundary line between the States at the place in question. Their materiality and effect are matters to be determined.

Prior to 1876, notably around "Island 37" and "Devil's Elbow," the bank on one side of the river was high and subject to erosion, the effect of the water against it; while on the opposite side the bank was a flat or sloping shore, so that the width of the river was materially affected by the rise and fall of the water, being considerably wider at normal than at low-water stage.

The following questions are submitted for the determination of this court:

(1) Arkansas contends that the true boundary line between the States (aside from the question of the avulsion of 1876) is the middle of the river at low water, that is, the middle of the channel of navigation; whereas Tennessee contends that the true boundary is a line equidistant from the well-defined banks at a normal stage of the river.

(2) Arkansas contends that by the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the river bed which was by the avulsion abandoned, whether the first or the second definition of the middle of the river be adopted; whereas Tennessee contends that the line was affected by the avulsion to the extent indicated by the opinion of the Supreme Court of that State in *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47; that is, that the effect of the avulsion was to press back the line between the two States to the middle of the old channel as it ran previous to the erosions upon the Tennessee banks that occurred between 1823 and 1876.

(3) Tennessee contends that, irrespective of the question of accretions and erosions, it is impossible now to locate accurately the line of the river as it ran in 1876 just prior to the avulsion, and that therefore the line of 1823

must prevail as the boundary line between the States, where it has been or can be located accurately and definitely; whereas Arkansas insists that there is no real difficulty in locating the middle of the river of 1876.

Upon the determination of these points, the court is to appoint a commission to run, locate, and designate the line.

Mr. Caruthers Ewing, with whom *Mr. John D. Arbuckle*, Attorney General of the State of Arkansas, was on the briefs, for complainant:

The terms "middle of Mississippi River," "middle of the stream of the Mississippi River," "center of the middle thread of the main channel of the Mississippi River," mean the same thing and designate the middle of the river at low water mark—the middle of the channel of navigation. *Iowa* v. *Illinois*, 147 U. S. 1; *Handley's Lessee* v. *Anthony*, 5 Wheat. 375; *Lamb* v. *Rickets*, 11 Ohio St. 311; *Franzini* v. *Layland*, 120 Wisconsin, 72, and many other cases in this and other courts. This court knows that the Mississippi River is sinuous, and that, on one side, in many places, will be found a sloping bank contiguous to which the water is very shallow, and on the opposite side a high bank with the water deep and navigable. If the contention of Tennessee be maintained, then at the point in controversy the navigable or steamboat channel of the river was wholly within the territorial limits of Tennessee or Arkansas dependent upon the nature of the bank at the particular point. This question is important because at low water stage the river would be about one-half mile wide and the line would therefore be about one-quarter of a mile from the high bank. At a normal stage of water the river at the *locus in quo* might be about a mile and a half wide. The line would therefore be about three-fourths of a mile from the high or bluff bank. The difference amounts to a strip of land many miles in length and a quarter of a mile wide, *i. e.*, about 4,000 acres.

In deciding otherwise and repudiating the rule announced in *Iowa* v. *Illinois*, *supra*, the Tennessee court (*State* v. *Muncie Pulp Co.*, 119 Tennessee, 47) misconceived earlier decisions in this court and ignored later ones.

It is recognized by all authorities that boundary lines are unaffected by an avulsion. The river's sudden abandonment of its bed left the line between the two States exactly as it existed at the time of this sudden and visible abandonment. *Missouri* v. *Kansas*, 213 U. S. 68; *Missouri* v. *Nebraska*, 196 U. S. 33; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 624; *Washington* v. *Oregon*, 214 U. S. 205; *Whiteside* v. *Norton*, 205 Fed. Rep. 5; and other cases.

Before the avulsion, the boundary line between the States followed the gradual and imperceptible shiftings of the river. What each State lost or gained by gradual and imperceptible shiftings was a permanent loss or gain except and unless these changes were undone as they were made, to wit, gradually and imperceptibly. Gradual and imperceptible changes in property rights and in boundary lines are unaffected by the fact that as the result of an avulsion land which had been lost by erosion is uncovered. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly; it never applies when the recession of the waters from the land is sudden and visible. *Jones* v. *Johnson*, 18 How. 150, 156; *St. Louis* v. *Rutz*, 138 U. S. 226; *Sapp* v. *Frazier*, 51 La. Ann. 1718; *Collins* v. *State*, 3 Tex. App. 323; *Bouvier* v. *Stricklett*, 40 Nebraska, 793; *Noyes* v. *Collins*, 92 Iowa, 566; *Wilson* v. *Watson*, 141 Kentucky, 324; and many other authorities. The case of *Mulry* v. *Norton*, 100 N. Y. 424, is about the only support to be found for the proposition that the doctrine of reliction can be invoked when the land is uncovered by an avulsion. The statement in the court's opinion to this effect is mere *dictum*. See *Matter of City of Buffalo*, 206 N. Y. 319. Land submerged by the sudden and violent action of the sea, as in *Mulry* v.

Norton, is land that is lost by an avulsion and the owner still has title thereto. He simply cannot use the land because it is covered with water. Land thus covered by water belongs to the owner wholly on the principle that an avulsion does not affect property rights and titles. To hold that the doctrine of reliction could be applied to land uncovered as the result of an avulsion would be to hold that boundary lines and property rights are affected by an avulsion, whereas the law is well settled to the contrary.

Mr. G. T. Fitzhugh, with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, was on the brief, for defendant:

The boundary between Arkansas and Tennessee is a line drawn along the middle of the Mississippi River at a point equidistant between its principal and well-defined banks, at a normal stage of water. It was so fixed by treaty and statute. [Citing the treaties and statutes considered in the early part of the statement, and Shannon's Code of Tennessee, § 80; Code of 1858, § 69.]

As long as water flows over the bed of a navigable stream, considerations of international policy may well support the rule that the boundary in such stream is along the "thalweg" or fairway, and this because the preservation of equality in the navigation of the river is of extreme importance to the nations bounded by such stream. The river is owned jointly by the two adjoining nations, and the purpose of the rule is to secure to both equal rights therein, the superlative one being the right of navigation; but when the water leaves its bed and establishes for itself a new channel, we respectfully urge that principles of equity, equality and right constrain the application of a new rule, which will give to each of the adjoining States an equal moiety in the land over which the water ran, and which is, by the aban-

donment of the stream, rendered fit for cultivation and use. *Iowa* v. *Illinois*, 147 U. S. 1; *Louisiana* v. *Mississippi*, 202 U. S. 1, 49; Chitty's Vattel, 4th Amer. ed., p. 156; 1 Moore International Law Digest, § 156; 8 Ops. Atty. Gen. 177, 178; Almeda, Derecho Publico, Tom. 1, p. 199; *Nebraska* v. *Iowa*, 143 U. S. 359; Sandars' Justinian, 1st Amer. ed., pp. 168, 169; *Missouri* v. *Nebraska*, 196 U. S. 23, 36; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535; *Nugent* v. *Mallory*, 145 Kentucky, 824.

It is next insisted by Tennessee that the line should run at a point equidistant between well-defined banks, at a normal stage of water, because this has been the long-established boundary, acquiesced in by both Arkansas and Tennessee and their predecessors in sovereignty for many years. Whatever may have been the proper construction of the Treaties of 1763 and 1783, it is clear that on the admission of Tennessee into the Union the western boundary of the United States was construed to be the "middle of the channel or bed" of the Mississippi River. It was so fixed by the treaty between the United States and Spain in 1795. Congress had no power to include within the territory of Arkansas, through the enabling act admitting it to the Union, territory within the boundaries of Tennessee, because Tennessee was the older State. Constitution, Art. IV, § 3; *Louisiana* v. *Mississippi*, 202 U. S. 40; *Washington* v. *Oregon*, 211 U. S. 127, 134. Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the Mississippi River. [Citing cases mentioned in the opinion and *Hearne* v. *State*, 121 Arkansas, 460.] Tennessee has recognized the same boundary, and acquiesced therein. *Moss* v. *Gibbs*, 10 Heisk. 283; *Foppiano* v. *Snead*, 113 Tennessee, 167; *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47, 73. Where a State has for many years exercised undisturbed jurisdiction over a particular territory, a prescriptive right arises, which is equally binding under

principles of justice on States as well as individuals. [Citing the cases on this subject mentioned in the opinion, and *Missouri* v. *Kansas*, 213 U. S. 78, 85.]

The line if fixed at the *filum aquæ* should be determined with reference to the normal stage of water. *State* v. *Burton*, 106 Louisiana, 732; *Hopkins Academy* v. *Dickson*, 9 Cush. 544, 552; *Warren* v. *Inhabitants of Thomaston*, 75 Maine, 329, 332; *Cessill* v. *State*, 40 Arkansas, 501; *State* v. *Muncie Pulp Co.*, *supra*.

The effect of avulsion is to leave the boundary in the abandoned bed of a stream, and it does not carry the boundary to the new channel. *Missouri* v. *Nebraska*, 196 U. S. 33; *State* v. *Muncie Pulp Co.*, *supra*; *Stockley* v. *Cissna*, 119 Tennessee, 135.

The doctrine of submergence and reappearance of land applies where lands have been submerged and the bed becomes dry, and old boundaries can be located or distinguished. *State* v. *Muncie Pulp Co.*, *supra*; Sir Matthew Hale's *De Jure Maris*, reprinted in Hargrave's Law Tracts, 36, 37, and notes to *In re Jennings*, 6 Cow. 518, 536, and *Mather* v. *Chapman*, 16 Am. Rep. 54; 7 Comyns' Dig., tit. Prerogative, D. 61; 5 Bacon's Abr., tit. Prerogative, p. 495; *Mulry* v. *Norton*, 100 N. Y. 424; *Morris* v. *Brook*, repr. Am. Reps. 206; *St. Louis* v. *Rutz*, 138 U. S. 226; *Stockley* v. *Cissna*, 119 Fed. Rep. 812; *Stockley* v. *Cissna*, 119 Tennessee, 135, 171; *Hughes* v. *Heirs of Birney*, 107 Louisiana, 664; *Chicago* v. *Lord*, 169 Illinois, 392; *Widicombe* v. *Rosemiller*, 118 Fed. Rep. 295; *Randolph* v. *Hinck*, 277 Illinois, 11.

In boundary disputes between nations the same rules will be applied as apply between individuals. *Trustees* v. *Hopkins*, 8 Porter, 9; *Nebraska* v. *Iowa*, 143 U. S. 359; 8 Ops. Atty. Gen. 175.

Tennessee contends that after the old channel ran dry, the owners of the banks and the bed should be restored to their own, according to the original boundaries fixed be-

fore the river changed its course or moved laterally in its bed, such lands being still susceptible of definite location.

MR. JUSTICE PITNEY, after stating the case as above, delivered the opinion of the court.

Concerning the proper location of an interstate boundary line with reference to the shores and channel of a navigable river separating one State of the Union from another, much has been written. The subject was brought under the consideration of this court in *Iowa* v. *Illinois*, 147 U. S. 1. In that case, Illinois contended that the boundary followed the middle of the channel of commerce, that is, the channel commonly used by steamboats and other craft navigating the river; while on the part of Iowa it was insisted that the line ran in the middle of the main body of the river, taking the middle line between its banks or shores, irrespective of where the channel of commerce might be, and that the measurements must be taken at ordinary stage of water. The contention of each State was supported by a decision of its court of last resort: *Dunlieth & Dubuque Bridge Co.* v. *County of Dubuque*, 55 Iowa, 558, 565; *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois, 535, 548. This court recognized these cases as presenting in the clearest terms the different views as to the line of jurisdiction between neighboring States separated by a navigable stream, and thereupon proceeded to analyze their reasoning and doctrine. From a review of the authorities upon international law, it was declared that when a navigable river constituted the boundary between two independent States the interest of each State in the navigation, and the preservation by each of its equal right in such navigation, required that the middle of the channel should mark the boundary up to which each State on its side should exercise jurisdiction; that hence, in international law, and by the usage of European

nations, the term "middle of the stream," as applied to a navigable river, meant the middle of the channel of such stream, and that in this sense the terms were used in the treaty between Great Britain, France, and Spain, concluded at Paris in 1763, so that by the language "a line drawn along the middle of the River Mississippi," as there used, the middle of the channel was indicated; that the *thalweg*, or middle of the navigable channel, is to be taken as the true boundary line between independent States for reasons growing out of the right of navigation, in the absence of a special convention between the States or long use equivalent thereto; and that although the reason and necessity of the rule may not be as cogent in this country, where neighboring States are under the same general government, yet the same rule must be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law; and that the Illinois Enabling Act of April 18, 1818, § 2, c. 67, 3 Stat. 428, which made "the middle of the Mississippi river" the western boundary of the State, the Missouri Enabling Act of March 6, 1820, § 2, c. 22, 3 Stat. 545, which adopted "the middle of the main channel of the Mississippi river" as the eastern boundary of that State, and the Wisconsin Enabling Act of August 6, 1846, c. 89, 9 Stat. 56, which referred to "the centre of the main channel of that river," employed these varying phrases as signifying the same thing. Hence we reached the conclusion (p. 13) that as between the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream, the controlling consideration "is that which preserves to each State equality in the right of navigation in the river." It was accordingly adjudged and declared that the boundary line between the contesting States was "the middle of the main navigable channel of the Mississippi River;" and a final decree to that effect was afterwards made, 202 U. S. 59.

The rule thus adopted, known as the rule of the "*thalweg*," has been treated as set at rest by that decision. *Louisiana* v. *Mississippi*, 202 U. S. 1, 49; *Washington* v. *Oregon*, 211 U. S. 127, 134; 214 U. S. 205, 215. The argument submitted in behalf of the defendant State in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, has failed to convince us that this rule ought now, after the lapse of twenty-five years, to be departed from.

It is said that Arkansas has interpreted the line to be at a point equidistant from the well-defined and permanent banks of the river, that Tennessee likewise has recognized this boundary, and that by long acquiescence on the part of both States in this construction, and the exercise of jurisdiction by both in accordance therewith, the question should be treated as settled. The reference is to certain judicial decisions, and two acts of legislation. In *Cessill* v. *State* (1883), 40 Arkansas, 501, which was a prosecution for unlicensed sale of liquors upon a boat anchored off the Arkansas shore, it was held that the boundary line, as established by the original treaties and since observed in federal legislation, state constitutions, and judicial decisions was the "line along the river bed equidistant from the permanent and defined banks of the ascertained channel on either side." This was followed in subsequent decisions by the same court. *Wolfe* v. *State* (1912), 104 Arkansas, 140, 143; *Kinnanne* v. *State* (1913), 106 Arkansas, 286, 290. The first pertinent decision by the Supreme Court of Tennessee is *State* v. *Muncie Pulp Co.* (1907), 119 Tennessee, 47, in which a similar conclusion was reached, partly upon the ground that it had been adopted by the courts of Arkansas. The legislative action referred to consists of two acts of the General Assembly of the State of Tennessee (Acts 1903, p. 1215, c. 420; Acts 1907, p. 1723, c. 516), each of which authorized the

appointment of a commission to confer and act with a like commission representing the State of Arkansas to locate the line between the States in the old and abandoned channel at the place that we now have under consideration; and the Act of 1907 further provided that if Arkansas should fail to appoint a commission, the Attorney General of Tennessee should be authorized to institute a suit against that State in this court to establish and locate the boundary line. These acts, far from treating the boundary as a line settled and acquiesced in, treat it as a matter requiring to be definitely settled, with the coöperation of representatives of the sister State if practicable, otherwise by appropriate litigation.

The Arkansas decisions had for their object the establishment of a proper rule for the administration of the criminal laws of the State, and were entirely independent of any action taken or proposed by the authorities of the State of Tennessee. They had no particular reference to that part of the river bed that was abandoned as the result of the avulsion of 1876; on the contrary, they dealt with parts of the river where the water still flowed in its ancient channel. The decision of the Supreme Court of Tennessee in *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47, sustained the claim of the State to a part of the abandoned river bed which, by the rule of the *thalweg*, would be without that State. The combined effect of these decisions and of the legislation referred to, all of which were subsequent to the year 1876, falls far short of that long acquiescence in the practical location of a common boundary, and possession in accordance therewith, which in some of the cases has been treated as an aid in setting the question at rest. *Rhode Island* v. *Massachusetts*, 4 How. 591, 638, 639; *Indiana* v. *Kentucky*, 136 U. S. 479, 510, 514, 518; *Virginia* v. *Tennessee*, 148 U. S. 503, 522; *Louisiana* v. *Mississippi*, 202 U. S. 1, 53; *Maryland* v. *West Virginia*, 217 U. S. 1, 41.

Therefore we find it unnecessary to decide whether the supposed agreement between the States respecting the boundary would be valid without the consent of Congress, in view of the third clause of § 10 of Art. 1 of the Constitution of the United States.

The next and perhaps the most important question is as to the effect of the sudden and violent change in the channel of the river that occurred in the year 1876, and which both parties properly treat as a true and typical avulsion. It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *New Orleans* v. *United States*, 10 Pet. 662, 717; *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 189; *Nebraska* v. *Iowa*, 143 U. S. 359, 361, 367, 370; *Missouri* v. *Nebraska*, 196 U. S. 23, 34–36.

There is controversy with respect to the application of the foregoing rule to the particular circumstances of this case. It is insisted in behalf of the State of Tennessee that since the rule of the *thalweg* derives its origin from the equal rights of the respective States in the navigation of the river, the reason for the rule and therefore the rule itself ceases when navigation has been rendered impossible by the abandonment of a portion of the river bed as the result of an avulsion. In support of this contention we are referred to some expressions of Vattel, Almeda, Moore, and other writers; but we deem them inconclu-

sive, and are of the opinion, on the contrary, that the contention runs counter to the settled rule and is inconsistent with the declarations of this court, in *Nebraska* v. *Iowa*, 143 U. S. 359, 367, that "avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel," or, as it is expressed on page 370, "the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel," and in *Missouri* v. *Nebraska*, 196 U. S. 23, 36, that the boundary line "must be taken to be the middle of the channel of the river as it was prior to such avulsion."

It is contended, further, that since the avulsion of 1876 caused the old river bed to dry up, what is called "the doctrine of the submergence and reappearance of land" must be applied, so as to establish the ancient boundary as it existed at the time of the earliest record, in this case the year 1823, with the effect of eliminating any shifting of the river bed that resulted from the erosions and accretions of the half century preceding the avulsion.

This contention is rested chiefly upon a quotation from Sir Matthew Hale, *De Jure Maris*, c. 4: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years." (1 Hargraves' Law Tracts, 15; Note to *Ex parte Jennings*, 6 Cow. 542.) To the same effect, 2 Roll. Abr. 168, l. 48; 7 Comyns' Dig., tit. Prerogative, D. 61, 62; 5 Bacon's Abr., tit. Prerogative, B. 1. A reference to the context shows that the portion quoted is a statement of one of several exceptions to the general rule that any increase

of land *per relictionem*, or sudden recession of the sea, belonged of common right to the King as a part of his prerogative. It amounts to no more than saying that where the reliction did but restore that which before had been private property and had been lost through the violence of the sea, the private right should be restored if the land is capable of identification. Such a case was *Mulry* v. *Norton*, 100 N. Y. 424, the true scope of which decision was pointed out in *In re City of Buffalo*, 206 N. Y. 319, 326, 327. But this doctrine has no proper bearing upon the rule we have stated with reference to boundary streams. Certainly it cannot be regarded as having the effect of carving out an exception to the rule that where the course of the stream changes through the operation of the natural and gradual processes of erosion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel. To give to it such an effect is, we think, to misapply the rule quoted from Sir Matthew Hale.

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined

according to the law of each State, under the familar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. *Pollard's Lessee* v. *Hagan*, 3 How, 212, 230; *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 358; *Scott* v. *Lattig*, 227 U. S. 229, 242. Thus, Arkansas may limit riparian ownership by the ordinary high-water mark; (*Railway* v. *Ramsey*, 53 Arkansas, 314, 323; *Wallace* v. *Driver*, 61 Arkansas, 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (*Elder* v. *Burrus*, 25 Tennessee, [6 Humph.] 358, 368; *Martin* v. *Nance*, 40 Tennessee [3 Head], 649, 650; *Goodwin* v. *Thompson*, 83 Tennessee [15 Lea], 209), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

It is hardly necessary to say that *State* v. *Muncie Pulp Co.*, *supra*, and *Stockley* v. *Cissna*, 119 Fed. Rep. 812, relied upon in defendant's answer as judicial determinations of the boundary line, can have no such effect against the State of Arkansas, which was a stranger to the record in both cases.

Upon the whole case we conclude that the questions submitted for our determination are to be answered as follows:

(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876.

(4) A commission consisting of three competent persons, to be named by the court upon the suggestion of counsel, will be appointed to run, locate, and designate the boundary line between the States at the place in question in accordance with the above principles.

(5) The nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion of 1876, and the question whether it is practicable now to locate accurately the line of the river as it then ran, will be referred to said commission, subject to a review of its decision by this court if need be.

The parties may submit the form of an interlocutory decree to carry into effect the above conclusions.

CITY AND COUNTY OF DENVER ET AL. *v.* DENVER UNION WATER COMPANY.

DENVER UNION WATER COMPANY *v.* CITY AND COUNTY OF DENVER ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Nos. 294, 295. Argued October 3, 4, 1917.—Decided March 4, 1918.

The findings of a special master appointed, with consent of parties, to take the testimony and report it with his findings of fact and conclusions of law for the advisement of the District Court, are not conclusive but subject to review by that court upon exceptions.

Where a master, so appointed, had heard the issues fully and admitted all proffered evidence, and the exceptions to his findings raised no serious questions of fact, this court found it unnecessary to remand the case to the District Court because the latter, erroneously, declined to pass upon the exceptions, but, having before it the evidence and all matters necessary for judgment, proceeded to do what that court should have done—considered the report, passed upon the exceptions, and made such decree as was deemed equitable.

Where a city was peculiarly dependent upon the continued use of the plant of a water company whose franchise had expired, the situation negativing the idea that other means were presently procurable or in contemplation for supplying the water vital to the community, and an ordinance was passed which, by its enacting provisions, not only fixed the rates which the company might charge in future but in addition provided for collecting charges semi-annually in advance for various uses which could not be discontinued on brief notice, required installation of meters for all prospective users, to be paid for monthly, and of hydrants to be ordered thereafter by the city upon extended as well as existing mains, at an annual rental, and imposed fines upon the company or its agents for any violation of the ordinance, *held*, that these provisions were inconsistent with declarations in the preamble characterizing the company as a tenant by sufferance and disclaiming any intention to recognize its right to

occupy the streets or continue the service; and that the ordinance should be construed liberally, so as to preserve the substantial rights of both parties, viz: as recognizing the city's dependence on the plant, as conferring, impliedly, whatever privileges might be necessary to enable the company to continue serving the public, as in effect requiring it to furnish water, and in terms forbidding it from exceeding the specified rates; and so, as granting a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as would be consistent with the duty owed by both to the inhabitants.

In view of the new rights so conferred upon the company, its plant employed in supplying the city with water must not be valued as "junk," but as property useful and in use in the public service, in determining whether the rates fixed by the ordinance allow an adequate return.

Nor is this question of value greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance.

In valuing the plant of a public service company as a basis for determining the adequacy of rates fixed by a city, it is proper to estimate land at present market value, and structures at reproduction cost less depreciation.

Also the "going-concern value," due to the fact that the plant is assembled and established, doing business and earning money, is a property right which should be considered in such determinations, and estimated in each case upon the circumstances therein presented.

What rate of compensation may be regarded as adequate depends greatly upon circumstances and locality. In this case, where the net annual return obtainable under the ordinance rates was but 4.3% (approximately), of the value of the plant, excluding certain disputed water rights, in a city where the prevailing rate of interest for secured loans on business and residence properties was 6%, with higher rates for loans less secured, *held*, that the return was clearly insufficient and that the ordinance amounted to a taking of the company's property without due process of law.

Whether, in Colorado, a company under franchise contract to furnish water for a city becomes the owner of water rights which it originates by diverting water from natural streams and supplying it to the consumers under short license contracts—not decided.

Modified and affirmed.

THE case is stated in the opinion.

Mr. James A. Marsh, Mr. Norton Montgomery and *Mr. Edward C. Stimson* for City and County of Denver *et al.*

Mr. Clayton C. Dorsey, with whom *Mr. Gerald Hughes* and *Mr. William V. Hodges* were on the brief, for Denver Union Water Co.

MR. JUSTICE PITNEY delivered the opinion of the court.

We have here an appeal and a cross-appeal from a final decree made in a suit in equity brought by the Denver Union Water Company against the City and County of Denver and the members of its council and other public officials, for the purpose of restraining the enforcement of an ordinance passed March 3, 1914, fixing the rates for water permitted to be charged thereafter by the company, upon the ground that they did not afford a fair and reasonable compensation, based upon the value of the property of complainant necessarily used in the service, and hence amounted to a taking of private property without due process of law within the meaning of the Fourteenth Amendment. The City and County of Denver is a municipal corporation having broad powers of self-government, including the power on the part of five per cent. of the electors to initiate an ordinance by petition. For convenience it will be referred to as the City.

An answer having been filed, putting the cause at issue, the District Court, by consent of parties, appointed a special master, "with all of the powers conferred upon the master under the rules of practice for the courts of equity of the United States, and subject to the further orders of this court, . . . for the purpose of taking all testimony in the suit and reporting to the court said testimony, his findings of fact and such conclusions of law as he may deem essential to the proper advisement of

the court." After a full hearing he made an elaborate report, sustaining complainant's main contention. The City and the Public Utilities Commission, defendants, filed numerous exceptions to his findings and conclusions, raising questions respecting certain elements that entered into his valuation of complainant's plant. Complainant, while declaring that it did not consent to a review of the report so far as it was conclusive under the order of reference, filed exceptions, subject to such ruling as the court might make respecting its reviewability. Upon these exceptions the cause came on to be heard, whereupon the court, being of the opinion that under the terms of the order appointing the special master his findings of fact were not open for its consideration, and that no material questions of law were raised that could be considered without an examination of the facts, ordered that the exceptions of both parties be struck out, confirmed the master's report, and passed a final decree in favor of complainant in accordance with his findings. Defendants appealed to this court, presenting assignments of error based upon the overruling by the District Court of their exceptions to the master's report. Complainant filed a cross-appeal presenting assignments of error for consideration only in the event that defendants' assignments of error, or some of them, should be sustained.

In our opinion, the District Court erred in declining to pass upon the questions raised by the exceptions. Although no opinion was filed, the ruling appears to have been based upon the theory that, because the order of reference was made by consent of parties, the conclusions of the master were not open to question. *Kimberly* v. *Arms*, 129 U. S. 512, 524, and *Davis* v. *Schwartz*, 155 U. S. 631, 633, 636, are cited in support, but they are distinguishable. In the former case, the reference, made by consent of the parties, authorized the master to hear the evidence and decide all the issues between them, and it

was because of this that the court held the findings were not merely advisory, as in the ordinary case, but were to be taken as presumptively correct, "subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise;" and that the findings ought to have been treated as "so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made." *Davis* v. *Schwartz* is to the same effect. In the present case, the consent given to the order of reference was conditioned by the terms of the order itself, which, as we have seen, limited the functions of the master to the taking of testimony and reporting it to the court together with his findings of fact and conclusions of law for the advisement of the court.

The error of procedure, however, does not necessitate sending the case back to the District Court. The issues were fully heard before the master, all proffered evidence was admitted, the exceptions taken to his findings raise no serious questions of fact, we have before us in the record the evidence and all other materials necessary for judgment, and will simply proceed to do what the District Court ought to have done, namely, consider the report and pass upon the exceptions, and make such decree as is equitable in the premises.

It was admitted before the master, and is not here controverted, that the company is the sole owner of the water works, plant, and system in question, including lands, diversion works, reservoirs, filters, conduits, distribution works, and other apparatus, and is serving the City and its inhabitants with water, that no other water works or system of distribution exists in the City, and that although the City has power to construct a system of its own (subject to a limit of cost that will be mentioned be-

low), it has not commenced to do so. It was, however, contended by defendants, in the answer and upon the hearing before the master—and the contention is here renewed—that as to such of the company's water diversion rights as had been acquired by it or its predecessors by original appropriation and user (as distinguished from those acquired by purchase) the right to the water itself was not the property of the company but of the City; and this upon the theory that, under the law of appropriation as it obtains in Colorado, the right of diversion belonged to those for whose use and benefit the appropriation was made, the company being entitled to compensation only for its services as carrier in distributing the water by means of the physical system owned by it.

The report of the special master shows, what is not disputed, that his investigation of the matters referred to him was most painstaking and thorough. In estimating the value of the company's property, he adopted the following method, with the practical consent of the parties: lands and water rights were appraised at their present market values; estimates of the cost of reproducing the structures were made, and, from this cost, allowance for accrued depreciation was deducted so as to determine the reasonable value of the structures in their present condition; and in estimating the cost of reproduction it was assumed that the work would be done under contract after fair competitive bidding, and with reasonable costs for engineering and superintendence in addition to the contract cost. Separate consideration was given to the various tracts of land owned by the company, and the various water rights, diversion works, reservoirs, conduits, distribution pipes, personal property, and other items constituting the plant. He found the plant to be in excellent condition, supplying water abundantly in excess of the needs of the community and under a proper pressure, and found its entire value to be $13,415,899, in which the

only elements seriously questioned by the City were: (a) the disputed water diversion rights, which he held to be the property of the company and valued at $1,998,117; and (b) an item of $800,000 for "going-concern" value, allowed by the master upon the ground that the company had "an assembled and established plant doing business and earning money," according to the principle laid down by this court in *Des Moines Gas Co.* v. *City of Des Moines*, 238 U. S. 153, 165. He made no allowance for franchise value or for any permanent right to maintain the water works in the streets of the City; but he did value the plant as capable of use and actually in use in the public service, and found that a new plant capable of serving the public with like efficiency could not be built for $13,415,899; a finding to which no exception was taken. The master further found that the net earnings of the company under the ordinance of 1914, after making proper allowances for operating expenses, taxes, and depreciation, would be $488,820, or only 3.64% of the reasonable value of the plant; while the prevailing rate of interest for secured loans on business and residence properties in Denver was about 6%, with higher rates for loans less adequately secured.

Defendants now insist that the company is occupying the streets and performing its service merely at sufferance; that its rights arose solely out of a franchise ordinance adopted in 1890 and which expired in 1910; and that the City now has the right to exclude the company from its streets, and hence the right to fix the terms upon which it shall continue to do business, and that the value to the company of the property under these circumstances is what it would bring for some other use in case the City should build its own plant—in other words as to a large part of the property, "junk value." Of course, it is a necessary corollary that the company may discontinue its service at will.

We are unable to regard the case as capable of being thus disposed of upon the basis of "junk value" for complainant's property.

In the first place, no such question is presented, either by the pleadings, the master's report, the exceptions, or the assignments of error. The bill averred that complainant was "entitled to have its property devoted to the public use of supplying the City and County of Denver and its inhabitants with water remain unimpaired in value, and to receive for the water supplied and services rendered a reasonable return upon the value of the property so devoted to said uses, and a sufficient amount to protect said property against depreciation and other impairments of value." The answer admitted complainant's ownership of the system of water works (except that as to certain of the water rights it was denied upon legal grounds that have been indicated), and admitted that "complainant is entitled to have its property devoted to the public use of supplying the City and County of Denver and its inhabitants with water remain unimpaired in value, so far as its actual use in supplying the City and County of Denver and its inhabitants with water is concerned, and to receive for the services rendered in supplying such water a reasonable return upon the value of the property devoted to such use, and a sufficient amount to protect said property against depreciation and other impairments of value in connection with such use and such water service." The answer further alleged that the rates fixed by the ordinance of 1914 "are fair, reasonable, just, and will produce for complainant a fair, reasonable, and adequate return upon the capital actually invested by complainant in its water system and carrying service." The master's report shows that no question was made before him but that the plant should be valued as a plant in use, except as it was contended that the item of $800,000 for going-concern value ought to be eliminated on the

ground that such an element of value, admittedly existent in a "purchase case," could not be considered in a "rate case," and on the further ground that the company's franchise had expired. This latter point was made the basis of one of the exceptions. Aside from this, the exceptions were devoted mainly to the contention, already mentioned, that the company's water rights, other than those which had been purchased, were the property not of the company but of the City. It was at no time contended that any element of value except "going concern value" ought to be excluded because of the expiration of the franchise. Defendants' assignments of error are based upon the exceptions, and raise no other question.

But, supposing the question were properly raised, we are convinced that by the true intent and meaning of the ordinance of 1914 new rights were conferred upon the company of such a nature that in considering the effect of the provisions limiting rates the plant must be valued not as "junk" but as property useful and in use in the public service.

It is true the title and preamble of the ordinance contain indications of a purpose to treat the company as a mere tenant by sufferance of the streets, but its enacting provisions do not carry out this purpose; and the measure must be construed as a whole, in the light of the circumstances existing at the time of its adoption, and with proper regard for the consequences that would result from giving to it the meaning contended for by the City.

Under the ordinance of 1890 the company had a franchise which expired April 10, 1910, at which time the City had an option either to purchase the works at an appraised valuation, or to renew the contract for a period of twenty years. After its expiration litigation ensued as a result of which this court held, in May, 1913, that the City was under no obligation to accept either option, and that its failure to renew the contract did not amount to an elec-

tion to purchase the plant. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 138. Meanwhile fruitless negotiations were conducted looking to a purchase of the plant by the City, but leaving the parties far apart upon the question of valuation. The City on May 17, 1910, adopted a charter amendment whereby it created the Public Utilities Commission, directed that an offer of $7,000,000 be made for the property of the company, and provided that in case of its rejection steps should be taken to construct a water system owned and operated by the City at a cost not to exceed $8,000,000. The water company rejected the offer of $7,000,000; but the City did not commence—has not yet commenced—the construction of its own water system. The company continued to supply water to the City and its inhabitants at the rates charged during the continuance of the ordinance of 1890. In August, 1913—after our decision in the case just mentioned—the City and the Public Utilities Commission appointed a commission of three to inspect, examine, and report upon complainant's water system, and after an investigation, during which complainant gave this commission every reasonable opportunity for inspection and examination of its records and data, the commission, on January 14, 1914, made a unanimous report to the effect that complainant's system was in excellent working condition, adequate for supplying the City's present needs, and worth, exclusive of going-concern value or water rights, something over $10,000,000, and declaring that it would take five years, without allowance for delays in legal proceedings, for the City to construct a new system of its own, and would cost $12,750,000. After this report, and on February 17, there was submitted to the electors and taxpaying electors of the City a contract by which the City was to purchase complainant's water system and properties at a price to be fixed by appraisers including the Public Utilities Commission who were to act for the

City, which contract complainant agreed to accept and abide by if favorably voted on by the taxpaying electors. It was rejected. Prior to the first of February the ordinance now in question, greatly reducing the rates, was prepared at the instance of the Public Utilities Commission, circulated as an initiated bill under the appropriate provision of the city charter, received the signatures of more than five per cent. of the electors, but only 5,593 in all,[1] was filed with the city clerk about a week after the election just mentioned, was introduced in the City Council, published once, and passed by the Council on March 3, without amendment and without hearings; that body having acted either in the belief that, since the measure was presented with the signatures of a sufficient number of the citizens, it was mandatory upon the Council to pass it, or else that they had no other option except to refer it to a vote of the people, which was not done. (See *Speer* v. *People*, 52 Colorado, 325, 343.) We remark upon the legislative procedure simply because of its bearing upon the interpretation of the measure, which, as we shall see, lacks certainty in its enacting clauses.

The practical situation existing at the time of its enactment is sufficiently clear from what has been said. The answer admits the averment of the bill that complainant has been and is compelled to continue to serve the City and its inhabitants with water, because there is no other supply of water available, and a cessation of its service would result in great suffering, damage, and loss of life. The City is located in a semi-arid region, and is and for nearly a half century has been absolutely dependent upon the continued operation of complainant's system. The termination of the legal franchise in 1910 did not absolve the City from its duty to the inhabitants. At the time of the enactment of the ordinance of 1914 the company's plant had been in use for four years since the expiration

[1] The population of the City, by the Census of 1910, was 213,381.

of the former franchise; the City, while endowed with the power to construct a system of its own, but only if it could be done at a cost not exceeding $8,000,000, had not yet commenced the construction of such a system, had just been officially advised that one could not be constructed for less than $12,750,000, and nevertheless had rejected a proposition to purchase complainant's system at an appraised value.

It is in the light of all these circumstances that the provisions of the ordinance of 1914 must be read. There is a preamble reciting that since 1910 the company had been without franchise and a mere tenant by sufferance of the streets, and that, while it had been supplying the City and its inhabitants with water, it had done so "at rates that are excessive and that should be reduced and regulated accordingly;" and there is a declaration that the enactment is made without recognizing the company's right to occupy the streets or to continue its service, but for the purpose of regulating and reducing its charges "during the time it shall further act as a water carrier and tenant by sufferance of said streets." But the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them. The first section establishes, as the maximum charges permitted to be made by the company, a detailed schedule of "*semi-annual* water rates payable *in advance* on the first day of May and November of *each year*." The various uses are specified, and many of these are of kinds that cannot be discontinued on brief notice. There is a special rate for irrigation by the season, May 1 to November 1. There is a provision for meter rates, payable monthly, with a clause requiring the company to instal a meter for any person desirous of using water by meter. Section 2 provides that for hydrants, including "those which may *thereafter* be ordered by the Council to be set upon existing mains or upon *ex-*

tensions thereof," the City shall pay *annual* rentals. And § 4 imposes fines upon the company and its agents for any violation of the ordinance.

Of course, these provisions are of themselves inexplicit; but in attributing a meaning to them the choice is between a liberal construction that preserves the substantial rights of both parties and a strict construction highly penal and destructive in its effect upon both. The subject-matter was a prime necessity of life, for which there was no substitute available. The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual. Without attributing to the initiators and to the City Council a purpose to subject the inhabitants to grave danger of disease or worse, we cannot read the enacting provisions as leaving the company actually without the right to maintain its plant in the City thereafter, for necessarily this would leave it at liberty to discontinue the service at will. The alternative, which we adopt, is to construe the ordinance as the grant of a new franchise of indefinite duration, terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the City upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates.

In this situation, there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the pub-

lic service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its "junk value." Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance. The reason is not obscure: the cost and detriment to a property owner attributable to the use of his property by the public, and the value of the service rendered by the property to the public, are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue. The cost of the service includes the use of the plant, but, ordinarily, not its destruction, except through the slow processes of wear and tear and obsolescence, for which graduated depreciation allowances are made. The whole calculation is a matter of income, not capital, accounting; and the cost and value of the use of a given property for a stated period is the same whether the use is to be continued after the expiration of the period or not. If the period is extended, compensation for the use is extended proportionately.

What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the special master hardly is disputed by appellants, except as they contest the items allowed for "going-concern value" and for the water rights acquired by complainant and its predecessors by original appropriation. With respect to the former item, we adhere to what was said in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153,

165: "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

As was then observed, each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants.

The only remaining question of serious moment is the allowance of $1,998,117 for the value of water rights acquired by original appropriation as distinguished from acquisitions by purchase.

The master found that these appropriations were made at times when the company or its predecessor held franchise contracts with the City calling for a supply of water to the inhabitants; that these contracts were limited to short periods, while the use by private consumers was under simple permits or licenses for periods of six months, at rates paid in advance, and under expressed conditions that terminated their right to use the water on violation of the reasonable rules of the company. The parties agree that such a diversion and beneficial use of the unappropriated water of a natural stream is sufficient to initiate and perfect a right to continue to use beneficially the volume of water so appropriated. Complainant contends, and the master held, that the ownership of the

appropriation under such circumstances may be fixed by contract between the one who diverts and the one who beneficially applies the water, and that under the circumstances of the case, upon a proper application of the rule adopted by the Supreme Court of Colorado in *City of Denver* v. *Brown*, 56 Colorado, 216, the water rights in question were owned by complainant.

Appellants contend that under the Constitution of Colorado, Art. 16, § 5, and under the law as established by repeated decisions of the Supreme Court, the right to the use of water is not permitted to be acquired by appropriation from the natural streams for purposes of sale or rental; that there is no ownership of the water or right to the use of it except by those actually applying it to a beneficial use; that not only must application to a beneficial use be united to diversion in order to render the right of appropriation complete, but that where a carrying company diverts water for the beneficial use of others it acts as the agent or quasi trustee of the consumers for the protection of their rights, and is not itself the owner of the rights of diversion.

In support of this view, *Wheeler* v. *Northern Colorado Irrigation Co.*, 10 Colorado, 582; *Farmers' High Line Canal & Reservoir Co.* v. *Southworth*, 13 Colorado, 111; *Combs* v. *Agricultural Ditch Co.*, 17 Colorado, 146; *Wyatt* v. *Irrigation Co.*, 18 Colorado, 298; *White* v. *Farmers' High Line Canal Co.*, 22 Colorado, 191; *Farmers' Independent Ditch Co.* v. *Agricultural Ditch Co.*, 22 Colorado, 513; *Wright* v. *Platte Valley Irrigation Co.*, 27 Colorado, 322, and some other cases are cited; it being insisted that they establish the rule contended for, and that their authority is not overthrown, but on the contrary recognized, by *City of Denver* v. *Brown*, 56 Colorado, 216. The question is one of great consequence, and is not free from difficulty. It ought not to be passed upon unless the exigencies of the case require it.

We find it unnecessary to determine it. As we have shown, the master found the value of complainant's entire plant, including these water rights, to be $13,415,899. Deducting $1,998,117, the entire value of the disputed rights, there remains a valuation of $11,417,782. No part of this is seriously disputed except the item for going-concern value, upon which we already have passed. The master found that the net earnings of the company under the ordinance of 1914 would be $488,820. No question is made about this, except some slight criticism of the depreciation charges that enter into the calculation; a criticism that we cannot sustain. The net return, therefore, is found to be only 4.2812 per cent. of the value of the plant, excluding the disputed water rights; while there is no controversy over the master's finding that the prevailing rate of interest for secured loans on business and residence properties in Denver is about 6%, with higher rates for loans less adequately secured. As was declared in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 48, the question of the rate of compensation that may be regarded as sufficient depends greatly upon circumstances and locality. In that case we held (p. 50) that complainant was entitled to 6% on the fair value of its property devoted to the public use. We have no hesitation in holding that the return yielded by the ordinance now before us is clearly inadequate, and amounts to a taking of complainant's property without due process of law, contrary to the provision of the Fourteenth Amendment in that regard, even excluding from consideration the disputed water rights.

The decree of the District Court will be modified so as to overrule, instead of striking out, the exceptions taken by defendants to the master's report, and as so modified it will be affirmed.

Modified and affirmed.

MR. JUSTICE HOLMES, dissenting.

This is a bill to restrain the enforcement of an ordinance of the City and County of Denver, passed on March 3, 1914, fixing the rates for water permitted to be charged thereafter to the City and its inhabitants. After the coming in of the answer the case was referred to a special master, there was an investigation of the usual kind, a report and afterwards a final decree for the Water Company, vitiated by the judge's assumption that he was bound by the master's findings of fact. But I need not dwell upon this mistake, because in my opinion the decision ought to be reversed upon a more important ground. In some instances it would be proper to send back the case for further consideration, *Wilson Cypress Co.* v. *Del Pozo*, 236 U. S. 635, 657; *Brown* v. *Fletcher*, 237 U. S. 583; *Marconi Wireless Telegraph Co.* v. *Simon*, decided to-day; *ante*, 46, but that is unnecessary when there is disclosed a fundamental bar to the bill, and I may add that, if this be the fact, no omission to raise the point in technical form would induce this Court to enter a decree contrary to the manifest equities of the case. Rule 35.

The Water Company occupied the streets of Denver with its pipes under an ordinance of April 10, 1890, and it is not denied that the franchise granted by that ordinance had expired. *Denver* v. *New York Trust Co.*, 229 U. S. 123. I am of opinion that the ordinance complained of does not grant a new term. Perhaps an instrument could be framed that granted while it said that it did not. But this ordinance qualifies all that follows by a preamble that recites that the Water Company is "without a franchise and a mere tenant by sufferance of the streets of the City and County of Denver" and then, "without in any manner recognizing said The Denver Union Water Company's right to occupy the streets of the City and County of Denver, or to continue its service as a water carrier,

but for the purpose of regulating and reducing the charges made by it during the time it shall further act as a water carrier and tenant by sufferance of said streets," goes on to fix the rates. It seems to me plain that the rates subsequently established even though purporting to be monthly or semi-annual are established subject to the preliminary declaration, and to the chance of the practically improbable earlier termination of the license or tenancy at sufferance. The ordinance does not attempt to require the Company to furnish water but simply fixes a limit to its charges while it does furnish it as such tenant at sufferance. While the service continues it is charged with a public interest and is subject to regulation by law. The question at the bottom of the case is what elements, if any, the Company has a constitutional right to have taken into account in determining whether the rates ordained are confiscatory, and, more generally, whether it has any constitutional rights at all in the matter of rates.

We must assume that the Water Company may be required, within a reasonable time, to remove its pipes from the streets. *Detroit United Railway* v. *Detroit*, 229 U. S. 39, 46. And, to illustrate the problem, it may be asked how a company in that situation can assert a constitutional right to a return upon the value that those pipes would have if there under a permanent right of occupation, as against a city that is legally entitled to reduce them to their value as old iron by ordering them to be removed at once. In view of that right of the City, which, if exercised, would make the Company's whole plant valueless as such, the question recurs whether the fixing of any rate by the City could be said to confiscate property on the ground that the return was too low.

I understand that the Water Company has a right to stop furnishing water, corresponding to the right of the City to order out the pipes. It is hard to see how prop-

erty could be confiscated by the establishment of almost any rate when whatever value it would have over and above that dependent upon the use of the pipes would remain to the Company if it stopped using them and therefore was in the Company's hands to preserve. The ordinance of the City could mean no more than that the Company must accept the City's rates or stop—and as it could be stopped by the City out and out, the general principle is that it could be stopped unless a certain price should be paid. *Lloyd* v. *Dollison*, 194 U. S. 445, 449. *Ashley* v. *Ryan*, 153 U. S. 436, 443, 444. See *Denver* v. *New York Trust Co.*, 229 U. S. 123, 141, 142. It is true that this principle has not been applied in cases where the condition tended to bring about a state of things that there was a predominant public interest to prevent, but I see no ground for the application here of anything to be deduced from *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56, or *Motion Picture Patents Co.* v. *Universal Film Manufacturing Co.*, 243 U. S. 502.

It may be said that to argue from such abstract rights is to discuss the case *in vacuo*—that practically the Company cannot stop furnishing water without being ruined, or the City stop receiving it without being destroyed. And no doubt this is true—but it also is true and not quite as tautologous as it seems, that the law knows nothing but legal rights. Something more than the strong probability that an enjoyment will continue must be shown in order to make an otherwise lawful uncompensated interference with it a wrong. See *Matter of City of Brooklyn*, 143 N. Y. 596, 616. *S. C.*, 166 U. S. 685. Or conversely if a legal title is taken it must be paid for in full notwithstanding a strong probability that the enjoyment of the property will continue long undisturbed. *Howe* v. *Weymouth*, 148 Massachusetts, 605, 606, 607. So here the mutual dependence of the parties upon each

other in fact does not affect the consequences of their independence of each other in law. The question before us is not what would be a fair compensation as between a necessary customer and a necessary seller, but simply whether the property of the Company is taken without due process of law by the City's fixing rates for a service, while it continues, that the Company may discontinue at will and the City may order tomorrow to stop. I am of opinion that it is not. See *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 340, 341. *Appelton Water Works Co.* v. *Railroad Commission*, 154 Wisconsin, 121, 136, 137. Whatever may be the duty of the City toward its inhabitants, that cannot enlarge its obligations to the Company or of the Company to it after the franchise of the latter has expired, or change the meaning of an ordinance that to my mind is plain upon its face. I presume that if it be necessary the City or the Legislature can take the water works by eminent domain.

The question is different from that which would arise upon a franchise having but a short time to run but still in force. It might be argued that the short life was a fact to be considered, as no doubt it would be in some connections. See *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 344; *West Springfield* v. *West Springfield Aqueduct Co.*, 167 Massachusetts, 128, 135; *Kennebec Water District* v. *Waterville*, 97 Maine, 185, 205. Or it well may be that while a limited franchise is in force the very fact that the Company has to rely upon the returns during the life of the franchise to reimburse its outlay and give it whatever profit it can make, entitles it to returns during that period unaffected by the approach of the end. There is no such question here.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur with this opinion.

Counsel for Parties.

SUTTON ET AL. *v.* ENGLISH ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

No. 330. Argued April 10, 1917.—Decided March 4, 1918.

In a suit in the District Court to set aside testamentary dispositions and adjudge the property to the plaintiffs and partition it among them as heirs, a defendant who, being also an heir, would share in the relief if obtained, should not be aligned as a plaintiff for the purpose of testing jurisdiction by diversity of citizenship, if such defendant be adversely interested as legatee.

Under constitution and statutes of Texas, the county court has no equitable jurisdiction of a suit *inter partes* to annul a disposition in a will and partition the property among the plaintiffs as heirs where title to land is involved and the amount in controversy exceeds $1,000.

Under the constitution of Texas, the District Courts of the State have no jurisdiction to annul by an original proceeding the action of a county court in probating a will; and a suit under Stats. Art. 5699 to contest the validity of a will so probated must be brought in the county court and calls for an exercise of original probate jurisdiction.

A suit which, in an essential feature, is a suit to annul a will, and which under the state law is in character merely supplemental to proceedings for probate and cognizable only by the probate court, is not within the jurisdiction of the District Court of the United States though diversity of citizenship exist and the requisite jurisdictional amount be in controversy.

Affirmed.

THE case is stated in the opinion.

Mr. Allen G. Fisher for appellants.

Mr. Cecil H. Smith, with whom *Mr. W. R. Abernathy*, *Mr. George R. Smith* and *Mr. Charles Batsell* were on the briefs, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

The United States District Court dismissed for want of jurisdiction a bill in equity brought by appellants, and certified in substance that the dismissal was based upon the ground that the bill and its exhibits disclosed no infraction of any right arising under the Constitution or laws of the United States; that the matter was cognizable solely in the county court of Collin County, Texas, a court of probate jurisdiction; and that the record disclosed no diversity of citizenship upon which the federal jurisdiction might be based, because it appeared that one of the defendants who should be considered as a plaintiff and the remainder of the defendants were in fact citizens of the same State.

The case comes to us by direct appeal, upon the jurisdictional question only, under § 238, Jud. Code.

The bill sets up diversity of citizenship and the fact that the amount in controversy exceeds that which is requisite for jurisdiction. It asserts no federal right. It alleges that the plaintiffs (seven in number) are citizens of States other than Texas, while of those named as defendants six (including Cora D. Spencer) are citizens of Texas and residents of Collin County in the Sherman Division of the Eastern District of that State, and the seventh is a municipal corporation of that State.

The averments of the bill are in substance as follows: That about the year 1866 Moses Hubbard and Mary Jane Hubbard, his wife, settled on a parcel of real estate in Collin County, Texas, and from that time continuously until the dates of their respective deaths lived as citizens and inhabitants of that county, and during their joint lifetime cohabited together as husband and wife; that the said Moses died in 1906, leaving his wife surviving, but no descendant or other heir; that she died in 1914, without children or husband, but leaving her surviving

the following heirs-at-law: a sister, Rachael E. Kirtley, two brothers, Albert E. Sutton and Delana M. Sutton, and the children of a deceased brother, Lewis Sutton, namely, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, George D. Sutton, and Lewis Sutton, Jr.; and that afterwards the last named died intestate, unmarried, and without descendants, leaving his mother, Helen M. Marshall, and his sisters and brother, Cora D. Spencer, Elizabeth E. Davis, Ida Krickbaum, and George D. Sutton, as his heirs. The persons named are stated to be the only heirs-at-law of Mary Jane and Moses Hubbard. All of them are plaintiffs in the suit except Cora D. Spencer, who is made a defendant.

The bill alleges, further, that Moses and Mary Jane Hubbard accumulated community property, real and personal (specified in the bill), of the value of about $100,000 situate in Collin and Denton counties, all of which descended to the said Mary Jane as survivor of the community.

That in the year 1897 Moses Hubbard, being then "subject to a mania or unsound idea relative to the memory of his deceased daughter," attempted a disposal of his wife's community property by a purported will (executed by his wife also and in form a joint and several will), by the terms of which it was attempted to establish in the community property after it should become separate property of Mary Jane Hubbard a certain charitable trust in perpetuity, in the name of the deceased daughter. Plaintiffs allege that this trust was void, for various reasons specified, and that if the instrument had any effect in law it created a naked trust whereof the said Mary Jane Hubbard was sole beneficiary. That afterwards and in the month of January, 1913, the defendant English, joining with himself the defendants Finley, Robinson, and Foster, acting as trustees of the charity, filed a petition in the district court of Collin County against

Mary Jane Hubbard and another, wherein it was alleged that the will of 1897 was a joint will, constituting an agreement binding upon both Moses and Mary Jane Hubbard, under which she received rights, emoluments, and privileges which she would not have had otherwise, and that she had accepted the will, and at all times since its probating had accepted and exercised those rights, privileges, and emoluments, by reason whereof the will was irrevocable by her, and that a trust was thereby created in behalf of the said English, Finley, Robinson, and Foster; that said petition prayed for a citation thereon and judgment that a trust be declared in favor of the petitioners; but plaintiffs herein allege that no citation was issued, that Mary Jane Hubbard had no notice of the proceedings, and that she was deceived into signing a purported waiver and disclaimer which was without consideration and void; that the judgment was never given by any judge or person possessing judicial power within the State of Texas; and that the petition was in effect an application for the construction of the paper as the will of Moses Hubbard, of which the district court had not jurisdiction in the first instance, and for which construction there was then and yet pending in the county probate court of Collin County a petition signed by the said purported trustees whereupon the judgment of the said county court would be binding upon them without the assumption of power in the district court of said county.

That, in addition to the community property, Mary Jane Hubbard accumulated real and personal property amounting in value to about $18,000; and that in her last sickness, while she was clouded in her intellect and was not of sound or disposing mind or memory, she was unduly influenced by the defendant English to execute an instrument in the form of a will purporting to dispose of her accumulations and separate property, by the 12th paragraph of which she gave and bequeathed all the res-

idue of her property to her niece Cora D. Spencer; that this will "ought to be annulled and set aside and held for naught; nevertheless, these plaintiffs do not desire to interfere with the distribution made by the defendant, Clayton, purporting to act as executor of said will, but they bring this bill for the purpose of having it annulled to the extent only that the 12th paragraph . . . be decreed . . . not to be a testamentary disposition of that portion of her separate estate which had once been community estate of the said Moses Hubbard and Mary Jane Hubbard;" and that the community property should be decreed to pass to the plaintiffs pursuant to the statutes of Texas as estate not devised or bequeathed, and should be divided among the plaintiffs in certain proportions specified.

The bill avers that the defendant English has usurped and taken possession of seven tracts of real estate and certain moneys, notes, and credits particularly described, and has rented the lands and converted to his own use their annual profit.

The prayer is that the defendants English, Finley, Robinson, and Foster account concerning the rents, issues, profits and income of said real estate and personal property; that the joint will of 1897 and every claim, judgment, or right based thereon be set aside and held for naught; that the supposed will signed by Mary Jane Hubbard, dated in 1914, and the 12th clause thereof be canceled and set aside and annulled; and that the property described in the bill and the earnings and rentals thereof be decreed to be the property of the plaintiffs as heirs-at-law of Mary Jane Hubbard, deceased, and be partitioned between them. There is also a prayer for general relief.

The objects of the suit, in their logical order, appear to be as follows: (1) to treat the joint will of 1897 as inefficacious to dispose of the community property, either

because this became the separate property of Mary Jane Hubbard at her husband's death, or because of Moses Hubbard's mental incapacity or the illegality of the terms of the trust; (2) to set aside a judgment said to have been obtained in the Collin County district court by defendant English and others, devisees under the joint will, establishing their title to the community property as against Mary Jane Hubbard; (3) to have her will annulled at least to the extent that the 12th paragraph, which gives and bequeaths all the residue of her property to Cora D. Spencer, be decreed not to be a testamentary disposition of that portion of the estate of testatrix which had been community property; and (4) that the community property, having thus been shown to have been separate estate of Mary Jane Hubbard and not to have been devised by her, be decreed to have passed to the plaintiffs as her heirs-at-law and be partitioned between them.

Upon this statement, it will be apparent that the court below erred in holding, as it did, that the defendant Cora D. Spencer should be treated as one of the plaintiffs and aligned with them for the purpose of determining the question of diversity of citizenship. Provided plaintiffs attained their first three objects, her interest would be the same as theirs with respect to the prayer for partition; but before this result could be reached plaintiffs must prevail as to their third object, and with respect to this her interest was altogether adverse to theirs. Therefore she was properly made a party defendant, that being her attitude towards the actual and substantial controversy. See *Removal Cases*, 100 U. S. 457, 468; *Pacific R. R.* v. *Ketchum*, 101 U. S. 289, 298; *Barney* v. *Latham*, 103 U. S. 205, 211; *Harter* v. *Kernochan*, 103 U. S. 562, 566; *Helm* v. *Zarecor*, 222 U. S. 32, 36.

This brings us to the question whether the subject matter of the suit is within the jurisdiction of a court of the United States.

By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a State, by statute or custom, gives to parties interested the right to bring an action or suit *inter partes*, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. *Broderick's Will*, 21 Wall. 503, 509, 512; *Ellis* v. *Davis*, 109 U. S. 485, 494, *et seq.*; *Farrell* v. *O'Brien*, 199 U. S. 89, 110; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 43.

It is the contention of appellants that the United States District Court had original jurisdiction of this cause (there being diversity of citizenship and a sufficient amount in controversy) because jurisdiction over a suit in equity of the same character would have existed in the county or district courts of the State.

In order to test this, we must consider the nature and extent of the jurisdiction of the courts referred to, as established by the constitution of Texas and statutes

passed in pursuance thereof (Vernon's Sayles' Tex. Civ. Stats. 1914), the material provisions of which are as follows: Under Const., Art. V, § 16, and Stats. Arts. 3206, 1763, 1764, 1766 and 1771, the county court has the general jurisdiction of a probate court, with power to probate wills, grant letters testamentary or of administration, settle accounts of executors and administrators, etc.; exclusive original jurisdiction in civil cases when the matter in controversy exceeds $200 and does not exceed $500, and concurrent jurisdiction with the district court when the matter in controversy exceeds $500 and does not exceed $1,000, but no jurisdiction of suits for the recovery of land or for the enforcement of liens upon land; and general authority to hear and determine any case, either of law or equity, but subject to certain limitations including those just mentioned. Under Const. Art. V, § 8, and Stats. Arts. 1705, 1706, 1712, and 3207, the district court has "appellate jurisdiction and general control in probate matters over the county court established in each county for the probating of wills, granting letters testamentary or of administration, settling the accounts of executors and administrators," etc.; also "original jurisdiction and general control over executors and administrators under such regulations as may be prescribed by law"; original jurisdiction of all suits for the trial of title to land and for the enforcement of liens thereon, and of all suits, without regard to any distinction between law and equity, when the matter in controversy exceeds $500; and, subject to limitations not now pertinent, general jurisdiction over any cause cognizable by courts either of law or equity.

It will be seen that the contention must be overruled at once, so far as concerns the equitable jurisdiction of the county court, because in the case before us the title to land is involved and the matter in controversy exceeds $1,000. The jurisdiction of the district court is not thus

limited, and, under local decisions (*Japhet* v. *Pullen*, 63 Tex. Civ. App. 157, and cases cited), it may be assumed that an independent suit in equity could be entertained by that court, and therefore—under the decisions of this court to which reference has been made—might be brought in the United States District Court, for the purpose of construing the joint will of Moses and Mary Jane Hubbard as inefficacious to dispose of the community property, and to set aside, for fraud or on other grounds, the judgment recovered by the defendants English and others against Mary Jane Hubbard establishing their title to that property; and that, if the title of complainants as heirs-at-law of Mary Jane Hubbard could thus be shown, the jurisdiction to partition the property would follow as of course. But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit.

But it is established by repeated decisions of the Supreme Court of Texas that under the present constitution the district courts have no jurisdiction to annul by an original proceeding the action of a county court in probating a will, their jurisdiction in the premises being confined to a review by appeal or certiorari, which are in effect but a continuation of the probate proceedings. It is further held that under a statutory provision (Art. 5699) reading: "Any person interested in any will which shall have been probated under the laws of this state may institute suit in the proper court to contest the validity thereof within four years after such will shall have been admitted to probate, and not afterwards," such a suit

must be instituted in the court in which the will was admitted to probate, that is to say, in the county court; and that it calls for an exercise of original probate jurisdiction. *Franks* v. *Chapman*, 60 Texas, 46; *Franks* v. *Chapman*, 61 Texas, 576, 579, 582, 583; *Heath* v. *Layne*, 62 Texas, 686; *Fisher* v. *Wood*, 65 Texas, 199, 204. And see *Dew* v. *Dew*, 23 Tex. Civ. App. 676; *Hilgers* v. *Hilgers*, 159 S. W. Rep. 851.

The present suit being, in an essential feature, a suit to annul the will of Mary Jane Hubbard, and a proceeding of this character being by the laws of Texas merely supplemental to the proceedings for probate of the will and cognizable only by the probate court, it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States.

Decree affirmed.

DENEE *v.* ANKENY, EXECUTRIX OF RIDPATH.

GUNNING ET AL. *v.* MORRISON ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 147, 440. Argued January 23, 1918.—Decided March 4, 1918.

An attempt to establish settlement by stealth and retain it by force against one who is in peaceable possession of public lands *bona fide* claiming them is not countenanced by the Homestead Law.

One who would acquire under the Homestead Law unappropriated public lands which are in the peaceable possession of another, is subject to the law of the State against stealthy entries and forcible detainers and providing for summary restoration of possessions so displaced without inquiry into the title or right of possession. Such a case presents no conflict between the state and federal law.

208. Argument for Plaintiffs in Error.

An enclosure of public land, accompanied by actual possession under claim of right and color of title, in good faith, is not obnoxious to the Fence Act of February 25, 1885, c. 149, 23 Stat. 321, nor subject, under the Homestead Law, to be broken and entered for the purpose of initiating a homestead claim.

85 Washington, 322; 91 Washington, 693, affirmed.

THE cases are stated in the opinion.

Mr. Fred B. Morrill, with whom *Mr. John J. Skuse* was on the briefs, for plaintiffs in error, in support of their contention that the right of a qualified person to make settlement upon unappropriated public land under the Homestead Law may not be thwarted or embarrassed by the unauthorized occupancy of another or by the state forcible entry and detainer statutes, relied upon a number of decisions of this court affirming the dominancy of federal laws respecting the public domain. The settler may go and remain upon the land. *Moss* v. *Dowman*, 176 U. S. 413; *Shepley* v. *Cowan*, 91 U. S. 330; *Anderson* v. *Carkins*, 135 U. S. 483; *Bohall* v. *Dilla*, 114 U. S. 47; *United States* v. *Waddell*, 112 U. S. 76. His entry upon unsurveyed public land plainly confers the right of possession, *Gauthier* v. *Morrison*, 232 U. S. 452; and, since the Fence Act of 1885, a valid settlement may be made upon public lands unlawfully enclosed, even though the settlement is effected by breaking and entering the enclosure. *Jones* v. *Kirby*, 13 L. D. 702; *Thompson* v. *Holyroyd*, 39 L. D. 362; *Stovall* v. *Heenan*, 12 L. D. 382; *Wheeler* v. *Rodgers*, 28 L. D. 250; *Norton* v. *Westbrook*, 9 L. D. 455; *Stoddard* v. *Neigle*, 7 L. D. 340. There is no contention that plaintiffs in error resorted to violence in making their settlement and establishing their residence. The lands in question being unsurveyed, the only way in which they could acquire any rights therein under the Homestead Laws would be by going in person and making settlement and establishing residence; and in order to protect the

rights thus acquired they must continue that residence. *Gauthier* v. *Morrison, supra.* There is no law under which a would-be settler can bring an action in court, or in the Land Department, to oust an unlawful occupant of public lands and thereby gain a preference right to make settlement and establish residence.

Plaintiffs in error are not attempting to put the title in issue. All they are claiming is that the lands have never been disposed of by the United States and are agricultural in character; that they are in possession of them under an act of Congress which grants them the right to enter and acquire possession, and that no court can under a state statute deprive them of that right. When it was shown that the lands had never been surveyed and title passed from the Government under an act of Congress, and that plaintiffs in error, having the necessary qualifications, were settlers under the Homestead Laws, the action should have been dismissed. If the decision of the court below is sustained, trespassers upon the public domain can, by enclosures, prevent any good faith settler from making a settlement, maintaining residence and acquiring title from the Government, under the settlement laws of the United States.

The entry into possession was not *unlawful* in the sense of the Washington Statute, Remington & Ballinger's Anno. Codes & Stats., § 811.

Mr. Reese H. Voorhees, with whom *Mr. D. W. Henley* and *Mr. H. W. Canfield* were on the briefs, for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court.

These cases involve the same points; the second was decided below upon authority of the first. 85 Washing-

ton, 322; 91 Washington, 693. It will suffice briefly to state and indicate our opinion in respect of the federal questions as raised in number 147.

The following portions of Remington & Ballinger's Anno. Codes & Stats. of Washington are in force as law in that State:

"Sec. 811. Every person is guilty of a forcible detainer who either,—

"1. By force, or menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or

"2. Who in the night-time, or during the absence of the occupant of any real property [unlawfully] enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

"Sec. 825. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

Relying upon these sections, Ridpath, the deceased, instituted an action of forcible detainer in the Superior Court for Spokane County alleging that while he was (and for more than five days had been) in peaceful and undisturbed possession of certain lands enclosed by a good and substantial fence plaintiff in error in the night-time, "broke the enclosure above mentioned around said above described premises and entered thereon and has since said

entry continuously occupied and remained upon said premises" and has refused to surrender them. He asked restitution and damages.

By answer and also by tender of proof plaintiff in error unsuccessfully sought to set up and show that the lands belonged to the United States (having never been granted), were unlawfully enclosed and that he entered in order to initiate a homestead claim. The Supreme Court affirmed a judgment granting the relief asked for by Ridpath. 85 Washington, 322, 325, 326, 327, 328. It found that for more than twenty years he had been in peaceful possession of the lands which were fenced and under cultivation; and that at night plaintiff in error broke the enclosure, entered and refused to remove.

After quoting the two sections set out above, the court said:

"These statutes are clearly peace statutes, and the issues in a case of this kind are but two: First, was the plaintiff, for five days prior to the entry of the defendant, in the peaceable and actual possession of the land, and second, was the entry of the defendant a forcible entry and an unlawful detainer? The statute makes no provision for the trial of title or the right of possession in such a case. Other remedies are afforded by other statutes to try title or right of possession. This statute does not contemplate that a person, even though he be entitled to possession, may, by force or stealth, obtain possession, and thereby put upon the plaintiff the burden of proving the paramount title or a paramount right of possession."

Replying to insistence that the premises were unappropriated public lands which a qualified citizen might rightfully enter upon and improve under laws of the United States (Rev. Stats., §§ 2289 *et seq.*) and the state statutes concerning unlawful or forcible detainer interfered therewith, the court declared: "It is clear, we think, that there is no conflict between the state statutes

and the United States statutes. The United States statutes have made no provision for determining conflicting rights under claim of possession, but the determination of these rights is left to the states to be regulated by state statutes. . . . *Gauthier* v. *Morrison*, 232 U. S. 452, 461, . . . The question in this case was, whether the respondent was in the peaceable and quiet possession of the real estate at the time of the forcible entry and unlawful détainer. If he was in the peaceable and quiet possession, then it follows, of course, that the appellant could not, by force or by unlawful entry in the nighttime, dispossess h n of that peaceable possession. As stated above, neither could the question of title, or the paramount right of possession, be determined in this action. There is clearly no conflict between the Federal and the state laws upon this question." This answer, we think, is sufficient, and nothing need be added.

To the further claim that the premises were fenced contrary to Act of February 25, 1885, 23 Stat. 321, 322, and consequently plaintiff in error could properly break enclosure and enter in order to initiate a homestead claim, the court replied: "It is plain that the legal right of the parties to the possession of these lands cannot be tried in this action. But if the same could be tried, the appellant did not seek to show, either that the respondent was in possession of this particular tract of land without claim of right or color of title, or in bad faith, for it was apparently conceded that the respondent, or his tenant, was in actual possession of the tract of land in dispute, and that the respondent had purchased the land at a fair price and was in possession thereof claiming to be the owner. . . . *Cameron* v. *United States*, 148 U. S. 301, 305, . . . Even though the respondent had enclosed the land claimed to have been enclosed, such enclosure was not necessarily unlawful, because the enclosure is not prohibited where it is under claim of right or color of title. The record in

this case conclusively shows that the respondent was holding the land, which was surrounded by fence, under claim of right and color of title, and he and his predecessors had so held it for more than 20 years." This reply we also think is correct and adequate.

In *Lyle* v. *Patterson*, 228 U. S. 211, 215, 216, we held a possessory title may be good as against all except the United States and pointed out the evil consequences which would "result if possession secured by violence and maintained with force and arms could furnish the basis of a right enforceable in law."

There is no error in either of the judgments below in respect of any federal question and both are

Affirmed.

LANE, SECRETARY OF THE INTERIOR, ET AL. *v.* MORRISON, FOR AND ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE CHIPPEWA TRIBE OF INDIANS IN MINNESOTA SIMILARLY SITUATED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 169. Argued January 30, 1918.—Decided March 4, 1918.

Congress, in the acts making appropriations under the general head for the "current and contingent expenses of the Indian Department [or Bureau] and fulfilling treaty stipulations with various Indian tribes," having long made a practice of appropriating each year specifically for the "civilization and self-support" of Chippewa Indians in Minnesota out of their trust funds under the Act of January 14, 1889, c. 24, 25 Stat. 642, *held*, that the appropriation so expressed in the appropriation act for the fiscal year 1915 was repeated for the fiscal year 1916 by the Joint Resolution of March 4, 1915, 38 Stat. 1228, which, in default of a new appropriation act, declared the

appropriations for the former year continued for the latter, employing only the general language of the former appropriation acts to designate the purposes, and providing against the duplication of special payments and the execution of any purpose intended by the former act to be paid for but once or confined to the former fiscal year.

45 App. D. C. 79, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for appellants.

Mr. Webster Ballinger for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellee by bill in Supreme Court, District of Columbia, sought to prevent officers of the Interior Department from disbursing during fiscal year ending June 30, 1916, one hundred and sixty thousand dollars out of trust funds belonging to Chippewa Indians of Minnesota on deposit in United States Treasury.

"An Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and fifteen," approved August 1, 1914, c. 222, 38 Stat. 582, 590, provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are provided for herein for the service of the

fiscal year ending June thirtieth, nineteen hundred and fifteen, namely:

* * * * * * * *

"Sec. 8. . . . The Secretary of the Interior is hereby authorized to withdraw from the Treasury of the United States, at his discretion, the sum of $205,000, or so much thereof as may be necessary, of the principal sum on deposit to the credit of the Chippewa Indians in the State of Minnesota, arising under section seven of the Act of January fourteenth, eighteen hundred and eighty-nine, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,' and to use the same for the purpose of promoting civilization and self-support among the said Indians in manner and for purposes provided for in said Act," provided [not more than $45,000 of this amount may be used for purchase of lands and removal of bodies of certain deceased Indians].

The annual appropriation bill for current and contingent expenses of the Bureau of Indian Affairs, etc., for fiscal year ending June 30, 1916, failed of passage and in lieu of it Congress passed the Joint Resolution, approved March 4, 1915, [38 Stat. 1228] which follows:

"Joint Resolution making appropriations for current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and sixteen.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all appropriations for the current and contingent expenses of the Bureau of Indian Affairs and for fulfilling treaty stipulations with various Indian tribes, which shall remain unprovided for on June thirtieth, nineteen hundred and fifteen, are continued and made available for and during the fiscal year nineteen hundred and sixteen

to the same extent, in detail, and under the same conditions, restrictions, and limitations for the fiscal year nineteen hundred and sixteen as the same were provided for on account of the fiscal year nineteen hundred and fifteen in the Indian appropriation Act for that fiscal year. For all of such purposes a sufficient sum is appropriated, out of any money in the Treasury not otherwise appropriated, or out of funds to the credit of Indians as the same were respectively provided in the Indian appropriation Act for the fiscal year nineteen hundred and fifteen: *Provided*, That the appropriations from the Treasury of the United States or from Indian funds shall not exceed in the aggregate the amounts of such appropriations for the fiscal year nineteen hundred and fifteen: *Provided further*, That this joint resolution shall not be construed as providing for or authorizing the duplication of any special payment or for the execution of any purpose provided for in said appropriation Act that was intended to be paid only once or done solely on account of the fiscal year nineteen hundred and fifteen . . ."

The original bill alleged that no part of the $205,000 appropriated by Act of August 1, 1914, was for expenses of the Bureau of Indian Affairs or for fulfilling treaty stipulations with Chippewa Indians of Minnesota but all (except the $40,000 item not here involved) was for special payments and limited to fiscal year ending June 30, 1915; that it was not intended as a regular annual appropriation and the Joint Resolution of 1915 in express language excluded such items in Act of 1914 from being re-expended during 1916; that notwithstanding this the Comptroller of the Treasury had ruled the Joint Resolution did reappropriate $160,000, and the Secretary of the Interior and Commissioner of Indian Affairs were preparing to expend such sum out of Indians' trust funds; and that unless enjoined they would draw warrants therefor upon the Treasury which would be honored.

Upon motion, the trial court dismissed the bill for want of equity. The Court of Appeals reversed the decree, holding the Joint Resolution did not re-appropriate $160,000 and the relief prayed should have been granted. Treating this as final and conclusive of issues involved the cause was brought here by appeal.

The only point presented for decision is whether by the language used Congress has sufficiently indicated an intent to appropriate the money in question. The bill does not challenge its power.

Under an Act approved January 14, 1889, 25 Stat. 642, lands in Minnesota occupied by Chippewa Indians were disposed of and proceeds deposited to their credit in the United States Treasury, it being agreed that the fund should bear five per cent. interest to be paid directly to the Indians or used for their schools, and further "that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof." For many years subsequent to 1889 under the general head of "Current and contingent expenses of the Indian Department . . . and fulfilling treaty stipulations with various Indian tribes" appropriations were made for general benefit of Chippewas "to be reimbursed to the United States out of the proceeds of sales of their lands." In 1911 their funds derived from land sales had become very large; and beginning then and continuing down to 1914 the annual Indian appropriations bill contained an item essentially similar (except as to amounts) both in words and position to the one in § 8, Act of 1914, quoted above.

It seems clear that "civilization and self-support" among the Indians cannot be promoted effectively by disconnected efforts, but must be accomplished, if at all, by definite, permanent plans operating through many years.

And in view of the long continued practice of Congress to provide funds for such continuous efforts by annual appropriations, the circumstances under which the Joint Resolution became law, and the studied incorporation therein of the language of former appropriation acts, we think the purpose was to authorize expenditure of $160,000 during 1916, as had been done for 1915. A different construction might have occasioned disruption of well ordered arrangements for advancing the Nation's wards, to the great detriment of all concerned; and to such unfortunate consequences experienced legislators probably were not oblivious.

By construing the resolution too narrowly the court below reached an erroneous conclusion. Its decree is therefore reversed; and the decree of the Supreme Court, District of Columbia, is affirmed.

Reversed.

MR. JUSTICE MCKENNA dissents.

UNITED STATES *v.* BATHGATE ET AL.

UNITED STATES *v.* BURCKHAUSER ET AL.

UNITED STATES *v.* COONS ET AL.

UNITED STATES *v.* FARRELL ET AL.

UNITED STATES *v.* KLAYER ET AL.

UNITED STATES *v.* URICHO ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 575–580. Argued January 16, 17, 1918.—Decided March 4, 1918.

It is a settled rule in the construction of statutes defining crimes that there can be no constructive offenses and that to warrant punishment the case must be plainly and unmistakably within the statute.

Criminal Code, § 19 (Rev. Stats., § 5508) punishing conspiracies to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, etc., does not include a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen.

This section means now what it meant when first enacted, as part of the Act of May 31, 1870, c. 114, 16 Stat. 140; see Crim. Code, §§ 339, 341; it aims to guard definite personal rights or privileges, capable of enforcement by a court, such as the right to vote for federal candidates, but not the political, non-judicable right or privilege, common to all, that the public shall be protected against harmful acts, to which latter appertain the general interests of candidate and voter in the fair and honest conduct of such elections.

In reaching this result the section is construed subject to the rule of strict construction, above stated, and in the light of the policy of Congress not to interfere with elections within a State except by clear and specific provisions.

The express repeal of that section of the original act which dealt with bribery (Act of May 31, 1870, *supra*, § 19) strengthens the conclusion.

Affirmed.

THE cases are stated in the opinion.

Mr. Assistant Attorney General Fitts for the United States:

Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon the Constitution of the United States.

The right of suffrage in the election of presidential electors, United States senators, and members of Congress, is such a right. *Ex parte Siebold*, 100 U. S. 371, 388, 389; *Ex parte Yarbrough*, 110 U. S. 651, 663; *United States* v. *Mosley*, 238 U. S. 383; and other cases.

The right to be free from bribery is included in the general right of suffrage, and is deducible from the above decisions; and is, therefore, together with certain other rights of a somewhat kindred nature, secured to the citizen and protected by § 19 of the Criminal Code. This section deals with federal rights guaranteed to citizens by the Constitution, and with *all* such federal rights, and protects all without limit. While it may have been conceived in the purpose to protect particular rights of a peculiar class of citizens, the language employed is plain and unambiguous, and Congress having committed itself to its employment is presumed to have intended to bestow full and absolute protection to the extent of such rights. *United States* v. *Mosley*, *supra*. Can it be that the general words are broad enough to protect the citizen who votes from personal violence or intimidation (*Ex parte Yarbrough*, *supra*), and the election itself from corrupt count and false certification (*United States* v. *Mosley*, *supra*), and yet not broad enough to protect the suffrage rights of a citizen from annihilation by the bribery of voters and the

consequent undermining of the fabric of representative government? In each case the power and the duty of the government arise not solely for protection to the parties concerned, but from the necessity of the government itself that a right which it has guaranteed shall in fact be protected, viz, the right that every citizen has to be assured by that government that the President, the senators and the members of the House of Representatives will be elected by the votes of free electors, cast according to their free and unpurchased volitions. If, as has been decided in the *Mosley Case*, it is an offense under § 19 for an election board to conspire to make a false return, it is equally an offense for conspirators on the outside to mislead the board into making a false return.

This general right of suffrage includes the right (a) to cast the ballot without personal violence or the threat of it, *United States* v. *Aczel*, 219 Fed. Rep. 917; 232 Fed. Rep. 652; (b) to have the votes counted as cast and certified as correctly counted, *United States* v. *Mosley*, *supra;* and, the government asserts, (c) the right to have honest votes measured against honest votes. *Commonwealth* v. *Rogers*, 181 Massachusetts, 184, and cases cited; *Ex parte Yarbrough*, *supra*, pp. 662, 663; *Commonwealth* v. *Silsbee*, 9 Massachusetts, 417, 418; *People* v. *Hoffman*, 116 Illinois, 587, 599.

Under the Constitution and laws of the United States citizens properly qualified have the right to submit their names to the electorate for presidential electors, United States senators, and representatives in Congress. The government is so formed that citizens must be chosen for federal offices, and of necessity it follows that the right given entitles the citizen to a fair ballot and an honest count, free from bribery or corruption of any kind. *United States* v. *Gradwell*, 243 U. S. 476, 480. The right to have the elections for federal candidates conducted fairly, is implied as essential to the existence of the government.

All the rights created or secured by the Constitution are not found in acts of Congress. See *In re Neagle*, 135 U. S. 1; *In re Quarles*, 158 U. S. 532; *Motes* v. *United States*, 178 U. S. 458, 462; *Logan* v. *United States*, 144 U. S. 263; *Hodges* v. *United States*, 203 U. S. 1; *Rakes* v. *United States*, 212 U. S. 55; *United States* v. *Lancaster*, 44 Fed. Rep. 885, 896; *Felix* v. *United States*, 186 Fed. Rep. 685.

The means employed in carrying out the conspiracy to violate the right and whether or not they also offend state laws are immaterial. *United States* v. *Gradwell*, 243 U. S. 476, distinguished. See *Aczel* v. *United States*, 232 Fed. Rep. 652, *s. c.* 244 U. S. 650, 651.

Mr. John R. Holmes and *Mr. Sherman T. McPherson*, with whom *Mr. Froome Morris* and *Mr. M. Muller* were on the brief, for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court.

Except as to parties, the indictments in these six cases are alike. Each contains three counts; the first and second undertake to allege a conspiracy to injure and oppress in violation of § 19, Criminal Code, and the third a conspiracy to defraud the United States, contrary to § 37. Demurrers were sustained upon the ground that rightly construed neither section applies to the specified acts.

Section 37, originally part of the Act of March 2, 1867, c. 169, 14 Stat. 471, provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or

both." It was considered in *United States* v. *Gradwell*, 243 U. S. 476, and held not applicable in circumstances similar to those here presented. The Government has accordingly abandoned the third count.

Section 19 provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." And the two counts based thereon charge defendants with conspiring to injure candidates for presidential electors, the United States Senate and representative in Congress at the regular election in Ohio, November 7, 1916, also qualified electors who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by Constitution and laws of the United States, namely—The right (a) of being a candidate (b) that only those duly qualified should vote (c) that the results should be determined by voters who had not been bribed and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others. The indictment further alleged the conspiracy was carried into effect as intended by purchasing votes of certain electors and causing election boards to receive them and make inaccurate returns.

The real point involved is whether § 19 denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States

senator and a representative in Congress are to be chosen. Our concern is not with the power of Congress but with the proper interpretation of action taken by it. This must be ascertained in view of the settled rule that "there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute" (*United States* v. *Lacher*, 134 U. S. 624, 628); and the policy of Congress to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation.

Departing from the course long observed, by Act of May 31, 1870, 16 Stat. 140, Congress undertook to prescribe a comprehensive system intended to secure freedom and integrity of elections. Section 19 of that act declares "that if at any election for representative or delegate in the Congress of the United States any person shall knowingly by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from freely exercising the right of suffrage; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; . . or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, . . . every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution." In pursuance of a well understood policy, the Act of February 8, 1894, c. 25, 28 Stat.

36, repealed the foregoing and other kindred sections in Act of 1870 but left in effect § 6, then § 5508, Rev. Stats., and now § 19, Criminal Code. See *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Gradwell*, *supra*.

The Government in effect maintains that lawful voters at an election for presidential electors, senator and member of Congress and also the candidates for those places have secured to them by Constitution or laws of the United States the right and privilege that it shall be fairly and honestly conducted; and that Congress intended by § 6, Act of 1870, to punish interference with such right and privilege through conspiracy to influence voters by bribery.

Section 19, Criminal Code, of course, now has the same meaning as when first enacted as § 6, Act of 1870 (see Criminal Code, §§ 339, 341); and considering the policy of Congress not to interfere with elections within a State except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters. Bribery, expressly denounced in another section of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election. This conclusion is strengthened by express repeal of the section applicable in terms to bribery and we think is rendered entirely clear by considering the nature of the rights or privileges fairly within intendment of original § 6.

The right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, which is

here relied on. The right to vote is personal and we have held it is shielded by the section in question. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, *supra*. The same is true of the right to make homestead entry, *United States* v. *Waddell*, 112 U. S. 76; also, of the right of one held by a United States marshal to protection against lawless violence. *Logan* v. *United States*, 144 U. S. 263. While the opinion in *United States* v. *Gradwell*, *supra*, does not determine the precise question now presented, it proceeds upon reasoning which contravenes the theory urged by counsel for the Government.

The court below properly construed the statute and its judgments are

Affirmed.

EGAN *v.* McDONALD.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 88. Submitted January 28, 1918.—Decided March 4, 1918.

Under § 7 of the Act of May 27, 1902, c. 888, 32 Stat. 275, an Indian allotment held under trust patent and subject to the restrictions on alienation imposed by the Act of March 2, 1889, § 11, c. 405, 25 Stat. 888, may, upon the death of the allottee, be conveyed by his heirs with the approval of the Secretary of the Interior, and the approved deed passes the full title.

Where such a conveyance was made in 1908, and the Secretary approved it in 1909, *held*, that there was no law then in force making an adjudication of heirship, either by a federal court or by the Secretary, a condition precedent to the validity of the conveyance. *McKay* v. *Kalyton*, 204 U. S. 458, distinguished.

Upon error to a state court in a case where a vendee sued to recover back earnest money paid his vendor, upon the ground that the title tendered by the latter was not merchantable, and where the vendor proved a conveyance of the land by certain heirs of the Indian

allottee thereof, which recited that they were the only heirs and was approved by the Secretary of the Interior, *held*, that whether the burden was upon the plaintiff to establish that there were other heirs, and whether the suggestion that there may have been such rendered the title unmerchantable, were questions of state law not reviewable by this court.

Whether the mere approval of such conveyance by the Secretary would operate to convey a good title if it had appeared that the deed was executed by a part of the heirs only—not decided.

36 S. Dak. 92, affirmed.

THE case is stated in the opinion.

Mr. George W. Egan pro se.

Mr. Charles O. Bailey and *Mr. John H. Voorhees* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Egan agreed to buy of McDonald a parcel of land in South Dakota and paid $1,000 to bind the bargain. McDonald agreed to furnish a merchantable title. After examining the abstract, Egan asserted that the title was not merchantable, demanded back his money, and, upon refusal, brought an action in a state court to recover it. Upon substantially undisputed facts judgment was entered for defendant and was affirmed on appeal by the Supreme Court of South Dakota (36 S. Dak. 92). The case comes here on writ of error under § 237 of the Judicial Code.

McDonald's title was this: (1) A twenty-five year trust patent dated December 12, 1895, for an Indian allotment issued to Weasel, under § 11 of Act of Congress, March 2, 1889, c. 405, 25 Stat. 888, 891; (2) Deed to R. J. Huston, dated October 9, 1908, from Plays and two others therein described as "sole and only heirs of Weasel, deceased, a Crow Creek Sioux Indian," approved by the Secretary of the Interior, March 2, 1909, and thereafter duly re-

corded in the Department of the Interior and the Registry of Deeds; (3) A final decree of distribution of the estate of Weasel in the county court making distribution of the land to Plays and two others as only heirs; (4) Deed from Huston to McDonald, dated November 3, 1910; (5) A decree of the state circuit court entered in 1912 in a suit brought by McDonald to quiet title and declaring him to be the owner in fee of the land.

Egan contends that this title was not merchantable, both because there was no power in the heirs of Weasel to alienate the property and because there had been no adjudication in any federal court that the three persons purporting to convey to Huston were the only heirs of Weasel.

First: As to the power of Weasel's heirs to convey: The trust patent was issued under § 11 of the Act of Congress of March 2, 1889. Under the provisions of that statute and the terms of the trust patent, the heirs, as well as Weasel, were without power to convey title before the expiration of the twenty-five years. But, by § 7 of the Act of Congress, May 27, 1902, 32 Stat. 275, adult heirs were given power to convey with the approval of the Secretary of the Interior; and it is declared that "such conveyances . . . when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee." Congress had, of course, power to remove the restrictions originally imposed upon alienation by heirs. *Williams* v. *Johnson*, 239 U. S. 414, 420.

Second: As to the lack of federal adjudication: Neither in 1908 when the deed to Huston was executed, nor in 1909 when it was approved by the Secretary of the Interior, was there any provision of law that heirs of an Indian allottee under a trust patent could make a valid conveyance only if some federal court should first have established that they were the heirs. Nor was there then a

provision, like that prescribed by Act of June 25, 1910, c. 431, 36 Stat. 855, that the Secretary of the Interior shall determine in such case who the legal heirs are. *Hallowell* v. *Commons*, 239 U. S. 506. Plaintiff relies upon *McKay* v. *Kalyton*, 204 U. S. 458, 468; but the case does not decide that adjudication of heirship in a federal court is a condition precedent to a valid conveyance by heirs. It decides merely that the Act of August 15, 1894, c. 290, 28 Stat. 286, which gave to Indians, who claimed to be entitled to an allotment, the right to litigate their claim in a federal court, did not confer the right to litigate in state courts.

Third: The case at bar is not a suit to establish who are the heirs of a deceased Indian allottee, nor a suit to establish the right to an allotment, nor a suit to quiet title. It is an action at law upon an implied promise to return the earnest money, if the vendor fails to furnish Egan a merchantable title. It was admitted that the persons who joined in the deed to Huston were heirs of Weasel and that they were adults. The state court held that, McDonald having shown a deed to Huston approved by the Secretary of the Interior and executed by three persons who declared themselves to be the only heirs, the burden was upon the plaintiff to establish the fact, if it was such, that there were other heirs; and that the mere suggestion in argument that there may have been some additional heirs does not cast such a suspicion upon the title as to render it unmerchantable. This is a matter of state law with which we have no concern. Nor have we occasion to consider whether, as held in *Daugherty* v. *McFarland*, 166 N. W. Rep. 143, the mere approval by the Secretary of the Interior would have operated to convey to the grantee a good title, even if it had appeared that the deed was executed by a part of the heirs only.

The decision of the Supreme Court of South Dakota is

Affirmed.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 98. Argued December 18, 19, 1917.—Decided March 4, 1918.

The "Call" rule of the Board of Trade of Chicago, prohibiting members of the Board from purchasing or offering to purchase, during the period between the session of the Board termed the "Call" and the opening of the regular session of the next business day, grain "to arrive," at a price other than the closing bid at the "Call," does not violate the Anti-Trust Law.

A rule or agreement by which men occupying strong positions in a branch of trade fix prices at which they will buy or sell during an important part of the business day is not necessarily an illegal restraint of trade under the Anti-Trust Law.

Every agreement concerning or regulating trade restrains; and the true test of legality is whether the restraint is such as merely regulates, and perhaps thereby promotes, competition, or whether it is such as may suppress or even destroy competition.

To determine this question, the court must ordinarily consider the facts peculiar to the business, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable.

The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts, not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and predict consequences.

It was therefore error for the District Court to strike from the answer in this case allegations concerning the history and purpose of the "Call" rule and to exclude evidence on that subject.

The rule of the Board of Trade here involved by nature is a restriction merely upon the period of price making; in scope it applies during a small part only of the business day, to a small part only of the grain shipped from day to day to Chicago, to an even smaller part of the day's sales, and not at all to grain shipped to any of numerous other

available markets; it has had no appreciable effect upon general market prices, nor has it materially affected the total volume of grain coming to Chicago, but, within the narrow limits of its operation, it has helped to improve market conditions in a number of ways.
Reversed.

THE case is stated in the opinion.

Mr. Henry S. Robbins for appellants:

The Sherman Law does not condemn a resort to normal methods of commercial exchanges to promote business, and in determining these, all the facts and conditions existing at the time, as well as the intent and purpose of the parties, should be considered.

This rule was but a normal method of promoting the business of the exchange and the welfare of its members, and did not differ from other methods proper for exchanges to resort to, including that preventing members from trading with non-members, which has been sustained by this court. *Gladish* v. *Kansas City Exchange*, 113 Mo. App. 726; *Board of Trade* v. *Dickinson*, 114 Ill. App. 295; *State* v. *Duluth Board of Trade*, 107 Minnesota, 506; *State* v. *Milwaukee Chamber of Commerce*, 47 Wisconsin, 670; *Stovall* v. *McCutchen*, 107 Kentucky, 577; *Anderson* v. *United States*, 171 U. S. 604; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600; *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 247.

The decree regulates intrastate trading. *Ware & Leland* v. *Mobile Co.*, 209 U. S. 405; *Engel* v. *O'Malley*, 219 U. S. 128.

Mr. Assistant to the Attorney General Todd, with whom *Mr. Lincoln R. Clark* was on the briefs, for the United States:

The intended effect of the regulation is to bind members of the Board to bid a uniform price in purchasing grain at country points, for Chicago delivery, between the close of

the "Call" and the opening of the regular session on the following day. The potency of members of the Board in the grain trade is reflexly shown by the primacy of the Board among grain markets of the world. Considering their influence, this agreement fixing the prices at which they would deal during an important part of each business day was an agreement in restraint of trade within the narrowest definition of the term. *United States* v. *United States Steel Corporation*, 223 Fed. Rep. 55, 155; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 56, 59. There is a complete analogy in principle between the present case and *Swift & Co.* v. *United States*, 196 U. S. 375, where it was held that an agreement of packers not to bid against each other in the purchase of cattle violates the Anti-Trust Law. The members of the Board agreed not to bid against each other in the purchase of grain at country points.

It is of no legal consequence that the restriction operates only during the afternoon. If such a restriction may be imposed in the afternoon, why may it not be imposed in the morning? Counsel for the Board was at pains to bring out that the rule did not in the slightest affect the price at which the owners of wheat in Chicago elevators could sell. This but emphasizes the illegality of the restriction. Why make a difference between buying wheat in the afternoon from elevators in Chicago and buying wheat in the afternoon at country points for subsequent delivery in Chicago? Why should sellers of wheat in Chicago enjoy a competitive market in the afternoon while sellers of wheat at country points are denied one?

Where, as here, the necessary effect of an agreement or combination is unduly to restrict competitive conditions, the purpose or intention of the parties is immaterial. Agreements or combinations producing that effect are prohibited by the Act of Congress; and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or pur-

pose. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. Bishop, New Criminal Law, § 343; Holmes, The Common Law, p. 52.

In *Thomsen* v *Cayser*, 243 U. S. 66, 86, after hearing "the good intention of the parties, and, it may be, some good results," once more put forward as a defense under the Anti-Trust Law, this court disposed of the contention in language which should be final.

As a matter of fact, however, with a single exception, none of the benefits claimed is attributable to the particular provision of the rule which the Government is attacking, i. e., the price-fixing restriction.

The claim that the rule enabled the grain merchants of Chicago "to work upon a closer margin of profit" doubtless has reference to the supposed advantage of a fixed price. This is the one exception to the statement that all the benefits claimed for the rule are referable to some other provision than the one under attack. And here, of course, the answer is that however beneficial a fixed price might be according to the point of view of the Board, Congress has proceeded on a different economic theory.

The proposition that the Board might lawfully have prohibited *all* trading between its members after a certain hour is mere assertion, unsupported either by reason or authority. Nor does the proposition that the Board could prohibit altogether trading between members and non-members rest upon any stronger foundation. *Anderson* v. *United States*, 171 U. S. 604, supports no such proposition.

Even should this court agree with the hypothetical premise that the Board could have prohibited *all* trading by members after exchange hours, or *all* trading with

non-members, it would still not follow that the Board, as a condition of withholding such prohibition, could prescribe the prices at which members should buy or sell.

Again, it is said that the restriction of competition caused by the rule was only incidental and "too small to be taken into account." The short answer is that the restriction was not "incidental"; it was direct and deliberate—the defendants "intended to make the very combination and agreement which they in fact did make." *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 243. Moreover, the restriction, besides being direct and deliberately imposed, was drastic; it interposed an absolute barrier against free agency in price-making at all times when the Board was not in session. The volume of business affected was also substantial.

The transactions actually were in large measure of interstate character. And, regardless of this character, the rule and the concerted action under it directly restrained an actual current of interstate commerce consisting of the grain moving from States other than Illinois to the Chicago market, by precluding members of the Board from competing with each other in the purchase of such grain after exchange hours. *Loewe* v. *Lawlor*, 208 U. S. 274; *Temple Iron Co.* v. *United States* (*United States* v. *Reading Co.*), 226 U. S. 324, 357–358. The case is like *United States* v. *Patten* (*Cotton Corner Case*), 226 U. S. 525, 543–544.

Mr. Justice Brandeis delivered the opinion of the court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236. Its 1600 members include brokers, commission merchants, dealers, millers,

maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (*a*) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (*b*) Future sales; that is, agreements for delivery later in the current or in some future month. (*c*) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9.30 A. M. to 1.15 P. M., except on Saturdays, when the session closes at 12 M. Special sessions, termed the "Call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with non-members at any time except on the premises occupied by the Board.[1]

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most pur-

[1] There is an exception as to future sales not here material.

chases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers offers to buy, at the prices named, any number of carloads, subject to acceptance before 9.30 A. M. on the next business day.

In 1906 the Board adopted what is known as the "Call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the Call. The Call was over, with rare exceptions, by two o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois this suit against the Board and its executive officers and directors, to enjoin the enforcement of the Call rule, alleging it to be in violation of the Anti-Trust Law (July 2, 1890, c. 647, 26 Stat. 209). The defendants admitted the adoption and enforcement of the Call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the Government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "Call" rule; and enjoined them from act-

ing upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District Judge. The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer

allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First: The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the Call until 9.30 A. M. the next business day: but there was no restriction upon the sending out of bids after close of the Call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the Call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the Call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second: The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales: members were left free to purchase grain already in Chicago from anyone at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from non-members anywhere except on the premises of the Board. It applied only to grain shipped to Chicago: members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Ne-

braska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third: The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(*a*) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(*b*) It brought into the regular market hours of the Board sessions more of the trading in grain "to arrive."

(*c*) It brought buyers and sellers into more direct relations; because on the Call they gathered together for a free and open interchange of bids and offers.

(*d*) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(*e*) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(*f*) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

(*g*) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(*h*) It enabled those grain merchants of Chicago who sell to millers and exporters to trade on a smaller margin and, by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(*i*) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfil their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in *Anderson* v. *United States*, 171 U. S. 604. Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

SEARS, TRUSTEE, *v.* CITY OF AKRON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 105. Argued January 21, 22, 1918.—Decided March 4, 1918.

Mere incorporation and organization under the general laws of Ohio (Gen. Code, 1910, §§ 10128–10134,) with power to construct and operate a hydro-electric power system at places designated in the certificate and to take water rights and riparian property for that purpose, does not imply a contract between the State and the company that the supply of water available shall not be diminished. Hence, a subsequent appropriation of the water by a city, acting under state authority, which involves no taking of property acquired by the company by purchase or condemnation under its charter, does not operate to impair the obligation of the charter.

Even if such a contract could be implied, an act of the legislature expressly authorizing such appropriation by the city should be treated as an exercise of the State's power to amend the company's charter, reserved by Art. XIII, § 2, of the Ohio constitution, and as revoking or modifying the contract by subordinating the company's right to the right of the city.

A hydro-electric company, organized under the general laws of Ohio with power of condemnation, adopted, through its board of directors, a plan of development involving the acquisition of the waters of a stream, with riparian land, and began certain condemnation proceedings, but never commenced construction work, and acquired none of the land until after the legislature had authorized a city to appropriate the water and the city, under an ordinance, had made the appropriation and practically constructed its works for using it. *Held*, that whatever preference the company may have gained under the general laws of the State, as against rival corporations and municipalities, its right of appropriation, no property having been acquired under it, was subject to the State's reserved power exerted by the act of the legislature, and that the appropriation for the city was not an unconstitutional taking of the company's property.

A state statute *held* not to violate Art. I, § 10, of the Constitution, or the Fourteenth Amendment, in authorizing a city to determine

without hearing the necessity and extent of an appropriation of private property for its public purposes.

An ordinance for the creation of a waterworks system and supply, adopted by the city council of Akron, to take effect September 10, 1912, pursuant to Ohio Gen. Code, 1910, §§ 3677–3697, was not repealed by the constitution adopted September 3, 1912, providing for a referendum in such cases, Art. XVIII, § 5, since the constitution did not become effective until November 15, 1912, when the ordinance was a valid, existing law, and the fact that no action may have been taken under the ordinance is immaterial.

Where there is no direct taking under the power of eminent domain, a riparian owner complaining of the act of a city in damming and diverting a stream for a municipal water supply will be remitted to his action at law for damages, unless the injury is clear and exceptional circumstances are present warranting resort to equity.

General allegations of fraud and insolvency *held* not to supply the absence of facts entitling plaintiff to equitable relief.

Affirmed.

THE case is stated in the opinion.

Mr. George W. Wickersham, with whom *Mr. Carroll G. Walter*, *Mr. William Z. Davis* and *Mr. Thomas F. Tracy* were on the briefs, for appellant.

Mr. John E. Morley, with whom *Mr. Scott Kenfield*, *Mr. Thos. H. Hogsett* and *Mr. Sheldon H. Tolles* were on the brief, for appellee.

Mr. William Z. Davis, by leave of court, filed a brief as *amicus curiæ* on behalf of the Cuyahoga River Power Co.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Akron, Ohio, lies on Little Cuyahoga River a short distance above its confluence with the Big Cuyahoga. In May, 1911, the legislature of Ohio granted to the city, by special act "the right to divert and use forever" for

the purposes of its water supply "the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state." [1] The city already possessed, under the general laws of Ohio, power to appropriate for this purpose, by condemnation proceedings, the property of any private corporation.[2] Acting specifically in exercise of the power conferred by the special act and of every other power thereunto enabling, the city, by resolution of its council, passed May 27, 1912, declared its intention to appropriate all the waters, above a point fixed, of the Cuyahoga River and tributaries; and by an ordinance, passed August 26, 1912, it appropriated the same, directed its solicitor to apply to the courts to assess the compensation to be paid, and provided for the payment of "the costs and expenses of said appropriation" out of an issue of bonds theretofore authorized. The city then con-

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[1] Act (House Bill No. 357) of May 17, 1911, Ohio Laws, vol. 102, p. 175:

An act to provide for granting to the city of Akron, Ohio, the right to use and occupy certain waters and lands of the state for waterworks and park purposes.

Section. 1. That there is hereby granted to the city of Akron, in the County of Summit, and state of Ohio, the right to divert and use forever for the purpose of supplying water to said city of Akron and the inhabitants thereof, the Tuscarawas river, the big Cuyahoga and little Cuyahoga rivers, and the tributaries thereto, now wholly or partly owned or controlled by the state and used for the purpose of supplying water to the northern division of the Ohio canal, provided, however, and this grant is upon the condition that at no time shall said city use the waters of any such stream, to such extent or in such manner as to diminish or lessen the supply now necessary, to maintain the flow in and through the canal as said canal now exists or as hereafter may become necessary for navigation purposes for an enlarged canal and upon the further condition that the city of Akron shall at all times save the state harmless from all claims arising from such grant and construction thereunder.

[2] General Code of Ohio (1910), §§ 3677–3697.

structed a dam and reservoir at the place specified and announced its intention of diverting the water before or by August 1, 1915.

On July 24, 1915, John H. Sears, a citizen of New York, filed in the Federal District Court for the Northern District of Ohio this suit, praying that the further construction of dam and reservoir and the diversion of the water of the river be enjoined, and alleged, in substance, the following facts: The Cuyahoga River Power Company, a hydro-electric corporation, was organized under the general laws of Ohio,[1] in 1908. The character of the company's enterprise is described in *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300; and its possible rights were considered in *Cuyahoga River Power Co.* v. *Akron*, 240 U. S. 462. On July 15, 1915, the company de-

[1] Now General Code of Ohio (1910), §§ 10128–10134.

The bill recites:

"Said corporation was formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Cuyahoga River in the State of Ohio to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all things necessary and incident to any of said purposes.

"The original articles of incorporation of said company provided that the improvements of said company should begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties."

livered to him as trustee a deed of trust of all its property to secure an issue of $150,000 of bonds. The property rights or interests which it is alleged the city was about to appropriate and for which it had not paid and proposed not to pay, arose from these transactions of the company:

It caused to be made and had, on or about June 3, 1908, adopted by resolution of its board of directors, surveys, maps and plans known as the "Roberts-Abbot Plan." Later it caused to be made and, about April 23, 1909, adopted by resolution of its board of directors, supplemental surveys, maps and a plan, known as the "Von Schon Plan," together with description of the several parcels of land required for carrying it out. The first plan provided for development, on the Big Cuyahoga, above the confluence of the Big and Little Cuyahoga rivers, within the limits of the location and plan of development set forth in its certificate of incorporation; and the papers also described the various parcels of land which the company would require for the purpose. The supplemental plan called for an extensive development including most of the rivers of northeastern Ohio, and provided, among other things, for a dam on the Big Cuyahoga above that of the city. It was confessedly beyond the powers conferred by the original certificate of incorporation. That certificate was not amended to include the necessary additional powers until after the passage of the Act of 1911. No public record or filing was made of either of those plans; and the law of Ohio makes no provision for such filing or for any record except that involved in condemnation proceedings. No condemnation proceeding was taken except that instituted June 5, 1908, under the original plan. It does not appear that any property was acquired under these proceedings. Shortly before the commencement of this suit, the company acquired, at a point some distance below the city's dam, a small parcel of

land, which, however, extended only to high-water mark. It also acquired, at another place below defendant's dam from another riparian owner, a contract for a portion of the river bed and the right to regulate, as to this land, the flow of the river; and acquired options for certain other properties. But the company has not commenced anywhere on the river any part of the proposed water-power development.

The right of property which the bill seeks to protect is mainly, if not wholly, the alleged right to construct and operate, in places designated in the certificate of incorporation, the power system described, without danger of impairment by any act of defendants. The bill alleges that the company "became possessed of and vested with the right to exercise the State's power of eminent domain in order to appropriate and acquire for its own corporate purposes such private property as it deemed necessary for carrying out and performing the matters and things set forth in its said articles of incorporation;" and that the city's proposed action would impair contract rights of the company and also take its property without compensation in violation of the Federal Constitution. The city moved to dismiss the bill, contending that it did not appear from plaintiff's allegations that any contract rights of the company had been impaired or that the city had taken or used, or threatened or proposed to take or use, any property of the company; that, on the contrary, the bill showed that the company had no property right which the city's action, taken or proposed, would involve appropriating; and that, for this reason, it had refrained from including in the condemnation proceedings instituted by it any alleged property rights of the company, and had not given to it any notice of the city's takings.

The motion to dismiss the bill was sustained by the District Court, on the ground that the company did not possess any such contract right or property as the city

was alleged to have impaired or invaded or threatened to appropriate; and also on the ground that the bill did not set forth facts entitling plaintiff to seek relief in equity and did disclose laches. A decree was entered dismissing the bill; and a direct appeal to this court was taken under § 238 of the Judicial Code.

First: As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the State granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1912 is a law which impairs that contract in violation of Article I, § 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the State with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co.* v. *St. Paul Water Commissioners,* 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant.[1] If by purchase or by right of eminent do-

[1] General Code of Ohio (1910):

"Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through

main under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may otherwise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter. Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the State's reserved power to amend or repeal, as provided in Art. XIII, § 2, of the Ohio constitution. *Ramapo Water Co.* v. *City of New York*, 236 U. S. 579, 583. The Act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State* v. *City of Hamilton*, 47 Ohio St. 52, 74; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258; *Berea College* v. *Kentucky*, 211 U. S. 45, 57.

Second: As to the alleged property rights: It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate

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tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid."

any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry. Co.* v. *New York State,* 176 U. S. 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development. For the property alleged to be now owned by the company was not acquired by it until after the city's development had been practically completed; and no work of construction has ever been commenced by the company.

Third: As to the alleged riparian rights: These consist of (a) the small parcel of land extending to high-water mark, which was acquired nearly three years after the ordinance of August 26, 1912, was passed; and (b) a contract with one Boettler for a portion of the river bed with a right to regulate flowage; and (c) certain options for other lands and rights, all of which also seem to have been acquired after the city's water development was practically completed. The city insists that the bill fails to show that it has taken or proposes to take or will injure

any of these, and also that it does not appear that the company has, in respect to any of these properties, any riparian right which conceivably could be taken or injured. This contention, which involves matters of state law, may possibly raise some questions presented to the state courts in *Boettler* v. *Akron*, 93 Ohio St. 490. But whether it is in all respects sound, we need not determine; for it is clear that, upon the facts alleged in the bill, the rights of the plaintiff in this property and the injury thereto, if any, are not such as to entitle him to relief in equity.

Fourth: Plaintiff contends that the ordinance is void because the general statute which authorized the appropriation violates both Article I, § 10, of the Federal Constitution and the Fourteenth Amendment, in that it authorizes the municipality to determine the necessity for the taking of private property without the owners having an opportunity to be heard as to such necessity; that in fact no necessity existed for any taking which would interfere with the company's project, since the city might have taken water from the Little Cuyahoga or the Tuscarawas rivers; and furthermore that it has taken ten times as much water as it can legitimately use. It is well settled that while the question whether the purpose of a taking is a public one is judicial, *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598; the necessity and the proper extent of a taking is a legislative question. *Shoemaker* v. *United States*, 147 U. S. 282, 298; *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 685; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 65. The legislature may refer such issues, if controverted, to the court for decision. *P. C. C. & St. L. Ry. Co.* v. *City of Greenville*, 69 Ohio St. 487.

Fifth: As a further ground for relief, plaintiff asserts that the whole water development of the city has been carried on without authority in law. The contention is, that the general statute on which the ordinance rests is

inconsistent with the new constitution, adopted September 3, 1912; that though the ordinance was passed before the new constitution took effect, it was not acted upon until after; and that therefore it was not within the saving clause and was repealed. Inconsistency is asserted for the reason that under the statute the city council possessed the full power to determine whether the city should undertake the water development, whereas the new constitution provided a right to a referendum on the subject, upon filing, within thirty days from the passage of the ordinance, a petition "signed by ten percentum of the electors of the municipality." Article XVIII, § 5. The bill alleges that the ordinance did not take effect until September 10, 1912; but the new constitution did not become effective until November 15, 1912. The ordinance was, therefore, a valid existing law when the new constitution became operative and was not repealed by it. The fact that no action may have been taken under the ordinance is immaterial. We need not, therefore, enquire whether plaintiff is in a position to avail himself of the alleged inconsistency.

Sixth: The city insists that it has not appropriated and does not intend to appropriate any property of plaintiff, and that, as to plaintiff, it is not exercising the power of eminent domain. If, as plaintiff contends, the city's whole water development is unauthorized, plaintiff clearly is not entitled to equitable relief. For then, the city's act in damming and diverting water would be that of an ordinary wrongdoer, for which riparian proprietors above or below, who are injured, would have only the usual remedy for a tort by an action at law for damages, unless exceptional circumstances render resort to a court of equity appropriate. *Parker* v. *Winnipiseogee Lake Cotton & Wollen Co.*, 2 Black, 545; *Osborne* v. *Missouri Pacific Ry. Co.*, 147 U. S. 248, 259. No such circumstances exist here. The bill shows clearly that, at least for the present,

the company cannot, by any conceivable diversion, be injured in any riparian properties and rights it may have; for it has not even commenced the construction of its projected power system, nor otherwise utilized the small parcel which it acquired shortly before this suit was instituted. Even if the company had riparian rights and should hereafter proceed with its development it might prove that defendant's diversion was of such a character that it would not substantially affect the company's use, *McElroy* v. *Goble*, 6 Ohio St. 187; or the circumstances might conceivably be such that the city would be held not to have exceeded its legal rights as riparian owner. *City of Canton* v. *Shock*, 66 Ohio St. 19; *Moody & Thomas Milling Co.* v. *City of Akron*, 93 Ohio St. 484; *Cleveland-Akron Bag Co.* v. *City of Akron*, 93 Ohio St. 486.

The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud and insolvency as the plaintiff has made.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration or decision of this case.

NELSON *v.* SOUTHERN RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 129. Argued January 8, 1918.—Decided March 4, 1918.

A civil engineer, employed by a railroad company, while surveying within one of its yards, was injured by a fall resulting from a defective tie and a space between ties unfilled by ballast. In an action

under the Federal Employers' Liability Act, *held*, upon the evidence, that the company did not fail in any duty which it owed to him. 170 N. Car. 170, affirmed.

THE case is stated in the opinion.

Mr. A. L. Brooks, with whom *Mr. O. L. Sapp*, *Mr. S. Clay Williams*, *Mr. R. C. Kelly* and *Mr. C. L. Shuping* were on the brief, for plaintiff in error.

Mr. Garland S. Ferguson, Jr., with whom *Mr. H. O'B. Cooper*, *Mr. L. E. Jeffries*, *Mr. Clement Manly* and *Mr. John N. Wilson* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Nelson, a civil engineer who had been in the employ of the Southern Railway eleven years, was directed to make a survey in one of its yards. While doing so he walked on the main track between the rails where he had seen others walk. As he stepped upon a cross-tie, a small V-shaped piece of it one and a half inches by six, being rotten, slivered off under his weight. His foot slipped down between the ties where the ballast was five or six inches below the top of the tie; and stumbling, he fell and dislocated his knee. The defect in the tie could have been discovered by sounding with an iron rod and the standard of maintenance of roadbed prescribed by the Railway was to ballast to the top of the ties. But neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of a character to impair safety in operation. Plaintiff knew that there were always some ties on the line which were partly decayed, and also that the ballast was occasionally below the top of the ties.

Upon these facts Nelson sought in a state court of North Carolina to recover damages from the Railway

under the Federal Employers' Liability Act. The trial court refused defendant's motion for a non-suit; and the jury rendered a verdict for plaintiff. Judgment thereon was reversed by the Supreme Court of the State (170 N. Car. 170) on the ground that there was no evidence of negligence; and the case came here on writ of error.

It is clear that the defendant did not fail in any duty which it owed to the plaintiff.

Judgment affirmed.

BILBY ET AL. *v.* STEWART ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 160. Submitted January 25, 1918.—Decided March 4, 1918.

The court may not review a judgment of a state supreme court resting on a non-federal ground adequate to support it.

Where the probate of the will of a full-blood Creek Indian was refused solely on the non-federal ground of mental incapacity, questions sought to be raised under acts of Congress, concerning the execution of the will, its legal effect, and the necessity for probate, *held* immaterial.

An attempt to raise federal questions through an application to file a second petition for rehearing in the state court comes too late.

Writ of error to review 153 Pac. Rep. 1173, dismissed.

THE case is stated in the opinion.

Mr. Lewis C. Lawson for plaintiffs in error.

Mr. George C. Crump, Mr. Jasper L. Skinner and *Mr. J. Ross Bailey* for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma, which affirmed on appeal the judgment of the Dis-

trict Court declining to probate an alleged will of Bruner, a full-blood Creek Indian, who, in the year 1912, died in that State possessed of his allotment, a bachelor without surviving parent.

The Act of April 26, 1906, c. 1876, 34 Stat. 137, relating to the Five Civilized Tribes, by § 19, prohibits members, for a period of twenty-five years, from alienating lands allotted to them; but by § 23, as amended by § 8 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 315, provides that, "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner, or a judge of a county court of the State of Oklahoma."

Section 1 of the Acts of Oklahoma for 1909, c. 41, provides:

"That no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Bilby, the main beneficiary named in the alleged will, and Moffitt, the executor, had first petitioned for its probate in the county court, where the heirs contested on the grounds of mental incapacity and undue influence and also on the ground that Bruner was by law prohibited from alienating or conveying his land. Probate was denied on the last ground; and the proponents appealed to the District Court where, as provided by the state law, it was tried *de novo*. That court, after an advisory verdict of a jury, denied probate solely on the ground of mental incapacity; and the errors assigned in the Supreme Court were substantially, that the judgment of the Dis-

trict Court was against the evidence. 153 Pac. Rep. 1173. The Supreme Court affirmed the judgment of the lower court and a petition for rehearing was denied without a statement of reasons. No federal question had been raised in the District Court, nor apparently up to that time in the Supreme Court. But an application was then made for leave to file a second petition for rehearing; and in it proponents set up, among others, the claim that because Bruner was a full-blood Creek Indian "the execution of said will and the legal effect thereof and the necessity or non-necessity of the probation of said will is thereby involved in this cause and presents federal questions." We need not, however, consider this contention. For since the Supreme Court rested its judgment upon a non-federal ground adequate to support it, the existence of a federal question is of no significance. *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300. And, besides, the attempt to raise it comes too late. *St. Louis & San Franciso R. R. Co.* v. *Shepherd*, 240 U. S. 240. The writ of error is

Dismissed.

BROGAN *v.* NATIONAL SURETY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 171. Argued January 30, 31, 1918.—Decided March 4, 1918.

The Act of August 13, 1894, c. 280, 28 Stat. 278, and the bonds given under it, must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

The act is not limited in application to labor and materials directly incorporated into the public work. The amendment of February 24, 1905, c. 778, 33 Stat. 811, does not change it in this respect.

Where, because of special circumstances, it was clearly indispensable to the prosecution of a public work that the contractor supply board to the laborers, and board was so supplied, exclusively in the work, the price being deducted monthly from their wages, *held*, that groceries and provisions furnished the contractor and so consumed by the laborers were materials used "in the prosecution" of the work, within the meaning of the aforesaid acts and the bond given to secure the contract.

In the absence of special circumstances making the boarding of the men a necessary and integral part of the work,—as where a contractor runs a boarding house as an independent enterprise, for profit,—the case would be outside the statute.

228 Fed. Rep. 577, reversed.

THE case is stated in the opinion.

Mr. John A. Cline for plaintiff in error.

Mr. John M. Garfield, for defendant in error, upon this question, distinguished *Lybrandt* v. *Eberly*, 36 Pa. St. 347; *Bangs* v. *Berg*, 82 Iowa, 350–353; *Kollock* v. *Parcher*, 52 Wisconsin, 393; and cited *Giant Powder Co.* v. *Oregon Pacific Ry. Co.*, 42 Fed. Rep. 470; *Sears* v. *Mahoney*, 66 Fed. Rep. 860; *Sica* v. *Kimpland*, 93 Fed. Rep. 403; *Bartlett* v. *U. S. Fidelity & Guaranty Co.*, 231 U. S. 237; *s. c.*, 189 Fed. Rep. 339; *Samuel Hastings Co.* v. *Lowrence*, 236 Fed. Rep. 1006; *Carson & Co.* v. *Shelton*, 128 Kentucky, 248; *Ferguson* v. *Despo*, 8 Ind. App. 523; *Parkinson* v. *Alexander*, 37 Kansas, 110; *Dudley* v. *Toledo A. A. & N. M. Ry. Co.*, 65 Michigan, 655; *Pennsylvania Co.* v. *Mehaffey*, 75 Ohio St. 432; *Luttrell* v. *Knoxville, L. & J. R. Co.*, 119 Tennessee, 492, as upholding the view that claims for board, food or groceries for workmen are not within either the act of Congress or state mechanics' lien statutes.

The men were paid in two mediums—money and food. It is only claimed that these groceries—this food—entered into the work contracted to be done by virtue of its having been consumed by the laborers. Therefore the conclusion of the Court of Appeals must be correct, i. e., that the

material furnished by Brogan only entered into the work under prosecution by the contractor after being transmuted into the form of physical energy and that it became related to the government contract only indirectly as labor and never as material. Brogan was not furnishing materials adapted for the construction of any part of the work to be performed under this contract, but loaned or advanced on credit to the contractor certain commodities with which the contractor paid his laborers. As found by the court below, there is not now and never has been any unpaid labor claim involved in this litigation. Money loaned to meet the payroll of the contractor has never been allowed as a lienable claim in the state courts. Nor does it give rise to a claim under the federal act. *Fidelity National Bank* v. *Rundle*, 107 Fed. Rep. 227; *Hardaway* v. *National Surety Co.*, 211 U. S. 552. See also *Parkinson* v. *Alexander*, 37 Kansas, 110; *Cadenasso* v. *Antonelle*, 127 California, 382; *City of Hamilton* v. *Stilwaught*, 11 Oh. C. C. 182; *Evans* v. *Lower*, 67 N. J. Eq. 232; *Gaylord* v. *Laughridge*, 50 Texas, 57; *Godeffroy* v. *Caldwell*, 2 California, 489; *Uralde Paving Co.* v. *City of New York*, 191 N. Y. 244; *McCormick* v. *Los Angeles Water Co.*, 40 California, 185.

Mr. Justice Brandeis delivered the opinion of the court.

This is an action against the surety on a bond given under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811. The claim of Brogan, an intervening petitioner, was allowed by the District Court; but the judgment was reversed by the Circuit Court of Appeals and judgment entered against him upon the undisputed facts (228 Fed. Rep. 577). The case comes here on writ of error under § 241 of the Judicial Code.

The facts undisputed or as found by the lower court and accepted by the Court of Appeals were these: The Standard Contracting Company undertook to deepen the channel in a portion of St. Mary's River, Michigan, located "in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses" and the contractor "was compelled to provide board and lodging for its laborers." Groceries and provisions of the value $4,613.87, furnished it by Brogan, were used by the contractor in its boarding house; and were supplied "in the prosecution of the work provided for in the contract and the bond upon which this suit is based. They were necessary to and wholly consumed in such work." The number of men employed averaged 80. They were "boarded" partly on the dredges, partly in tents supplied by the contractor; all under an arrangement made with the labor unions—by which the contractor was to board the men and deduct therefor $22.50 a month from their wages. The contract and the bond executed by the National Surety Company bound the contractor to "make full payment to all persons supplying him with labor or materials in the prosecution of the work provided for in" the contract.

The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate. But the surety contends that the words "in the prosecution of" the work are not used in the bond and the act in their natural sense, but should be given a conventional meaning so as to exclude labor and materials which contribute to construction only indirectly, as do the supplies consumed by a contractor in operating his plant. In support of this position, attention is called to the fact that while the Act of 1894 provided that the bond should have "the additional

obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work;" and that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work"; the Act of 1905 specified that recovery could be had by the persons who had "furnished labor or materials *used* in the construction or repair" of the work. But the change in phraseology is not significant. The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor. *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 218. See Report of Committee on H. R. 13,626, 58th Cong., 2d sess., No. 2360. It was pointed out in *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 538, that "In respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894;" and in *Hill* v. *American Surety Co.*, 200 U. S. 197, 201, that "In respect to the persons entitled to the benefit of the bond there has been no material change in the act." *Illinois Surety Co.* v. *Peeler*, *supra*, p. 224.

This court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 34, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which entered into the construction of the ship. In *United States Fidelity Co.* v. *Bartlett*, 231 U. S. 237, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened fifty miles away. This included, as the record shows, the labor not only of men who stripped the earth

to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment; and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks. In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, recovery was allowed not only for the rental of cars, track and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

The Circuit Court of Appeals deemed immaterial the special circumstances under which the supplies were furnished and the findings of fact by the trial court that they were necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond. In our opinion these facts are not only material, but decisive. They establish the conditions essential to liability on the bond. The bare fact that the supplies were furnished to the contractor and were consumed by workmen in its employ would have been immaterial. A boarding house might be conducted by the contractor (like some company stores concerning which States have legislated, *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224) as an independent enterprise undertaken solely in order to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the particular locality where the public work is being performed. The laborers might resort to such a boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a matter independent of the work provided for in the

contract and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. But here, according to the undisputed facts and the findings of the trial court, the furnishing of board by the contractor was an integral part of the work and necessarily involved in it. Like the supplying of coal to operate engines on the dredges, it was indispensable to the prosecution of the work, and it was used exclusively in the performance of the work. Groceries furnished to a contractor under such circumstances and consumed by the laborers, are materials supplied and used in the prosecution of the public work. The judgment of the Circuit Court of Appeals is therefore reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE MCKENNA, MR. JUSTICE PITNEY, and MR. JUSTICE MCREYNOLDS dissent.

McCURDY, COUNTY TREASURER OF OSAGE COUNTY, OKLAHOMA, ET AL. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 685. Argued January 18, 1918.—Decided March 4, 1918.

Whether, in view of the limitations of Art. IV, § 3, and the Ninth and Tenth Amendments of the Constitution, Congress has power to exempt from state taxation land purchased for a tribal Indian which when acquired was part of the mass of private property subject to the state taxing power and jurisdiction, is a substantial constitu-

tional question, affording ground, if properly raised, for direct appeal from a decree of the District Court.

Upon a direct appeal from the District Court, based upon a constitutional question, all questions involved are open for review and there is no occasion to consider the constitutional question if the case may be disposed of on other grounds.

The Acts of June 28, 1906, c. 3572, 34 Stat. 539, and April 18, 1912, c. 83, 37 Stat. 86, respecting the Osage Indians, do not authorize the Secretary of the Interior to impose restrictions upon private land purchased for a non-competent Osage allottee with his trust money, previously released under § 5 of the latter act, and thus exempt it as a governmental instrumentality, during such restraint, from the power of the State of Oklahoma to tax it and to sell it for the collection of such taxes. *United States* v. *Rickert*, 188 U. S. 432, distinguished.

The land was originally part of the Osage Reservation but had been sold under the Osage Townsite Act, and for some years had been part of the private land in the State and had been taxed as such. The taxes in question were imposed after the purchase for the allottee and attempted imposition of restrictions.

Section 5 of the Act of April 18, 1912, *supra*, authorizing the Secretary of the Interior in his discretion and under rules and regulations to be prescribed by him to pay to any Osage allottee all or any part of the funds held for his benefit when satisfied that the allottee is competent or that the payment would be to his manifest best interests and welfare, and the regulations issued thereunder dated June 26, 1912, both contemplate supervision of the expenditure of the money but not control of property for which the money may be expended. In this case, moreover, where the land purchased was first conveyed to a trustee for the allottee and another, the terms of the trust not here appearing, and later was deeded by the trustee to the allottee with an expressed restriction on alienation, *non constat* that the restriction was a continuation of control reserved by the Secretary rather than an assumption of control of part of the Indian's estate theretofore freed.

Reversed.

THE case is stated in the opinion.

Mr. Preston A. Shinn for appellants.

Mr. Assistant Attorney General Kearful for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Osage Tribe of Indians consisted in 1906 of two thousand persons. Their reservation, located in Oklahoma Territory between the Arkansas River and the Kansas state line, contained about a million and a half acres of fertile well-watered prairie land and of heavily timbered hill lands, largely underlaid with petroleum, natural gas, coal and other minerals. At that time the United States held for the tribe a trust fund of $8,373,658.54, received under various treaties as compensation for relinquishing other lands. The annual income of the tribe from interest on this trust fund and from rentals of grazing, oil, and gas lands was nearly $1,000,000; that is $500 for every man, woman and child, in addition to the earnings of individuals.[1] Congress, concluding apparently that the enjoyment of wealth without responsibility was demoralizing to the Osages, decided upon the policy of gradual emancipation. By Act of June 28, 1906, 34 Stat. 539, it provided for an equal division among them of the trust fund and the lands. The trust fund was to be divided by placing to the credit of each member of the tribe his pro rata share which should thereafter be held for the benefit of himself and his heirs for the period of twenty-five years and then paid over to them respectively (§§ 4 and 5).[2]

[1] Annual Reports, Dept. Interior (1905), pp. 306–312; (1906), pp. 448, 451.

[2] Sec. 4. That all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due, or may hereafter be found to be due the said Osage tribe of Indians, shall be held in trust by the United States for the period of twenty-five years from and after the first day of January, nineteen hundred and seven, except as herein provided: . . . . .

Sec. 5. That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in

The lands were to be divided by giving to each member the right to make, from the tribal lands, three selections of 160 acres each and to designate which of these should constitute his homestead. A commission was appointed to divide among the members also the remaining lands, after setting aside enough for county use, school-sites and other small reservations. The oil, gas, coal and other mineral rights were reserved to the tribe for the period of twenty-five years with provision for leasing the same. The homesteads were made inalienable and non-taxable for twenty-five years or until otherwise provided by Congress. All other allotted lands—which were known as "surplus lands," were made inalienable for twenty-five years and non-taxable for three years, except that power was vested with the Secretary of the Interior to issue to any adult member, upon his petition, a certificate of competency, authorizing him to sell all of his surplus lands; and upon its issue all his surplus lands became immediately taxable. By Act of April 18, 1912, § 5,[1] 37 Stat.

trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided.

[1] Act of April 18, 1912, § 5:

Sec. 5. That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian

86, 87, Congress authorized the Secretary of the Interior to pay to any Osage allottee "in his discretion" "under rules and regulations to be prescribed by him and upon application therefor" all or part of the funds held for his benefit, provided the Secretary is satisfied either that the allottee is competent or that such payment would be to "the manifest best interests and welfare of the allottee."

In 1913 (apparently in March), the Secretary paid from the principal of the trust funds held for Robert Panther, a non-competent [1] allottee, the sum of $1,750, which was applied in payment for a lot of land in the City of Pawhuska. The land when purchased was conveyed to one Brenner as trustee for Robert and Emma Panther, but soon after was conveyed by Brenner to Robert individually. The deed to Robert contained the following clause:

"This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office."

The land was originally a part of the Osage Reservation and became part of Pawhuska when that town was established under the Osage Townsite Act (March 3, 1905, 33 Stat. 1061). When Oklahoma was admitted into the Union in 1907, the town became the City of Pawhuska and a part of Osage County. The land had passed into private ownership before 1908, became taxable then under the laws of Oklahoma and taxes were assessed thereon and

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and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

[1] Act of April 18, 1912, § 9:

Sec. 9. The word "competent," as used in this Act, shall mean a person to whom a certificate has been issued authorizing alienation of all lands comprising his allotment, except his homestead.

were paid until about the time of the conveyance to Brenner in trust for the Panthers. Then default was made and the land was sold by the county treasurer for failure to pay taxes for the second half of 1912.

In January, 1917, the United States tendered to the holder of the tax certificate and to the county treasurer the amount of the 1912 and 1913 taxes and penalties and demanded a redemption receipt. The tender was refused, because it did not include the taxes and penalties for 1914, 1915 and 1916; and the county treasurer gave notice of intention to issue the tax deed. Thereupon the United States filed, in the federal District Court for the Western District of Oklahoma, this suit against the county treasurer for an injunction to restrain the issue of the tax deed. The Government contended, that as the land had been bought for Panther and was by deed made inalienable without the consent of the Secretary of Interior, it was while so held an instrumentality lawfully employed by the Government for the protection of an Indian and as such exempt from taxation by the State or any subdivision thereof. On the other hand the county treasurer and the city (which was permitted to intervene) contended that Congress had not authorized the Secretary of the Interior to invest the trust fund for the Indians' benefit or to impose restriction on alienation of property purchased with money from that source; that the insertion in the deed of the provision against alienation did not have the effect of exempting the land from taxation by the State; and that it was not the intention of Congress to do so. It was also contended that such exemption was not within the powers of Congress as limited by Article IV, § 3, and the Ninth and Tenth Amendments of the Constitution; since before imposing the restriction by deed, the land had become a part of the private property subject to the jurisdiction of the State. A decree was entered granting, in effect, an injunction against taxation during the period of restric-

tion of alienation; and the case is brought here on direct appeal under § 238 of the Judicial Code, on the ground that constitutional questions are involved.

The jurisdiction of this court was questioned; but the case is properly here. The constitutional question is substantial, was properly raised below, and was passed upon there. We have, however, no occasion to consider it; since all questions involved in the case are before us, *Northwestern Laundry* v. *Des Moines*, 239 U. S. 486, 491, and there are other grounds on which the decree must be reversed.

Under the Act of June 28, 1906, the Secretary of the Interior had no authority to release or to invest any part of the principal of the trust fund held for Panther. His authority to release rests wholly upon § 5 of the Act of April 18, 1912. That section confers upon him, if application is made therefor, discretion whether to release or to withhold. If the release "would be to the manifest best interests and welfare of the allottee" it may be made although the allottee is not competent, as that term is defined in § 9 of the act. The Secretary is authorized to prescribe the rules and regulations under which such releases shall be made; but he is not given authority to exercise control of any property in which the funds released may thereafter be invested, or otherwise to create with the released funds a governmental instrumentality for the protection of the Osages. Congress apparently believed that, in order to prepare the Indian for complete independence, he must be educated in self-control, and that this could best be done by committing to him gradually the care of his property. That course necessarily involved the risk of some property being lost through improvidence. But in the case of the Osages the risk was not attended by serious danger. Even if the whole trust fund should be released and, despite supervision, improvidently spent, the legally competent allottee would

still have his homestead and his share in valuable undivided oil, gas and coal rights; and the legally incompetent, his surplus lands in addition. There is nothing in the act or in the facts to which it applies that indicates a purpose to extend governmental control to property in which released funds may be invested. And there are in both the Act of 1906 and in that of 1912 provisions which show that Congress intended to restrict the tax exemption. By § 2 of the Act of 1906 the surplus lands became taxable after three years, even if they remained inalienable. By § 7 of the Act of 1912 both the lands and funds of allottees or their heirs are protected against claims arising prior to competency, inheritance or removal of restrictions; but it is expressly provided "That nothing herein shall be construed so as to exempt any such property from liability for taxes."

The regulations issued under date of June 26, 1912, afford no support to the Government's contention. They provide, among other things, that:

(*a*) "One who has not received a certificate of competency, but who has made good use of all moneys paid to him and has properly used the lands and rentals under his control belonging to his minor children may be considered competent to handle his trust funds."

(*b*) (In case of adults neither aged, physically disabled, nor incompetent to a degree requiring legal guardianship, the applicant must agree) "to abide by a stipulation in the claim that the money is to be deposited in bank to his credit and expended under the supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs."

Like the act under which they are framed, these regulations contemplate supervision of the expenditure of money, not control of the property, if any, for which the money is expended. They tend to confirm the contention of the appellants that after the money is paid out of the bank it

and property in which it may be invested are to be free from any restriction. Under the Act of 1906, the Secretary of the Interior when applied to for a certificate of competency was confronted with serious alternatives. If he issued the certificate, all the allottee's surplus lands—about 495 acres [1]—would at one time be freed from restrictions on alienation and become subject to disposition by him without governmental control. If the Secretary refused to issue the certificate, the allottee would (unless the certificate were granted later) remain, until the end of the twenty-five year period, in the enjoyment of the income merely; and at the end of that period, he or his heirs though unaccustomed to the control of property, would get absolute dominion at one time over the (a) homestead, (b) surplus lands, (c) the trust fund ($3,928.50),[2] and (d) his share of the interest in the oil, gas, coal and mineral rights. The Act of 1912 made possible the release of parts of the trust fund from time to time. The risks to be incurred at any one time could be made quantitatively as small as the Secretary of the Interior might deem advisable; and by the regulations the risk was reduced in degree, by virtue of the requirement that the money must be "deposited in bank and expended under supervision of the superintendent, subject to instructions from the Indian Office, if the Secretary of the Interior so directs." The policy of education and development through the bank account had been tried and found promising.[3] The regulations greatly extended

[1] Report of Com. of Indian Affairs (1912), p. 63.

[2] Report of Com. of Indian Affairs (1910), p. 47.

[3] Report of the Com. of Indian Affairs (1912), pp. 64, 66: "As the keynote of Indian progress has been individualism, perhaps the most effective general action taken during the fiscal year was the sending of a personal letter to each superintendent handling individual Indian funds in order to impress upon his mind a most important consideration—that the funds of an able-bodied Indian should be handled in such a way as not to weaken his moral stamina as a man."

the field of operation by providing that one legally incompetent might get such release where he had made good use of the moneys theretofore paid him or of the lands under his control. It is education through the responsibility for spending, not the property purchased with released moneys, which constitutes the instrumentality employed by the Government in fitting the individual Osage Indian to take his full part as a citizen of the United States.

Furthermore, in the case at bar it is not shown that the money released from the trust was invested directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed and was used to pay for a conveyance of the land to Brenner, as trustee for Robert and Emma Panther. What the terms of the trust were, does not appear. But there is nothing in the record to indicate that a restriction upon the alienation of the land was among them or that the Secretary of the Interior expressly reserved control over the property or its proceeds. It may well be that the Commissioner of Indian Affairs then believed that an ordinary trust of the property for a short period would best advance the interests of Panther. It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County*, 143 Fed. Rep. 287, much relied upon by the Government. There is also a clear distinction between the present case and those like *United States* v. *Rickert*, 188 U. S. 432, where it was sought to tax property, the legal title of which was in the United States and which was held by it for the benefit of Indians.[1]

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[1] See *United States* v. *Pearson*, 231 Fed. Rep. 270.

263. Counsel for Plaintiff in Error.

While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day, *ante*, 88: but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation.

The decree is reversed with directions to dismiss the bill.

Reversed.

ANDREWS, EXECUTRIX OF ANDREWS, *v.* JOHN NIX & COMPANY.

ANDREWS, EXECUTRIX OF ANDREWS, *v.* HENDRICKSON.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

Nos. 140, 141. Argued January 22, 1918.—Decided March 4, 1918.

Creditors who participated in the initiation of involuntary bankruptcy proceedings, in the election of a trustee and in a creditors' meeting resulting in expense to the estate, and who filed and secured allowance of their claims, but who received no payments and, before any dividend was declared, obtained an order that their claims be wholly withdrawn and expunged and excluded from participating in the distribution of the estate, *held* not to be "creditors participating in the distribution" of the estate "under the bankruptcy proceedings" within the meaning of § 70a, subdivision 5, of the Bankruptcy Act. 88 N. J. L. 721, 718, affirmed.

THE cases are stated in the opinion.

Mr. Samuel H. Richards, with whom *Mr. Thomas E. French* was on the briefs, for plaintiff in error.

Mr. Henry F. Stockwell, with whom *Mr. E. G. C. Bleakly* was on the briefs, for defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases, presenting the same question for decision, were argued and will be decided together.

On February 3, 1910, the defendant in error, John Nix & Company, and two other creditors filed an involuntary petition in bankruptcy against Benajah D. Andrews. On the 15th day of the same month Andrews died and the plaintiff in error was duly appointed executrix of his will. On the 4th of the following April the estate of Andrews was adjudicated bankrupt by the District Court and on the 28th day of the same month a trustee was appointed. Each of the defendants in error promptly made proof of a claim against the bankrupt estate, and both claims were forthwith allowed.

On February 13, 1914, almost four years after these claims were allowed, on the application of Nix & Company and of Hendrickson, the District Court ordered that the claim of each of them "be wholly withdrawn from said bankruptcy proceeding and expunged from the list of claims upon the record in this case and excluded from participating in the distribution of the estate . . . of the bankrupt." After the entry of this order a dividend was declared and paid by the trustee in which Nix & Company and Hendrickson did not participate. No order for the discharge of the bankrupt estate was applied for or granted.

At the time of his death Andrews owned two policies of insurance upon his life, one payable to his estate and the other payable to his executors, administrators and assigns. The proceeds of these two policies, less loans secured by them and less their surrender value, which was paid to the trustee in bankruptcy, were paid to the

plaintiff in error as executrix and the money is held by her subject to the decision of this case.

The defendants in error instituted suits in the Supreme Court of the State of New Jersey to recover judgments on the same claims which had been allowed by the trustee but were subsequently withdrawn. The cases were submitted to the court upon a stipulation as to the essential facts substantially as we have stated them, and each recovered a judgment which was affirmed by the Court of Errors and Appeals of the State of New Jersey, which judgments are before us for review.

The case is in very narrow compass and calls upon us to consider the proviso of subdivision 5 of § 70a of the Bankruptcy Act of 1898 and to decide whether the defendants in error "participated in the distribution" of the bankrupt's estate under the bankruptcy proceedings, within the meaning of that proviso, which reads as follows:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy *free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings*, otherwise the policy shall pass to the trustee as assets."

The argument of the plaintiff in error is that these defendants are brought within the purpose, if not within the express terms, of this statutory proviso and should not recover, for the reason that they participated in the election of the trustee in bankruptcy, proved their claims, and were represented in the meeting of creditors at which important action was taken involving expense to the bankrupt estate.

Unfortunately for the validity of this argument the provision of the statute is not that the proceeds of the insurance policies may be held "free from the claims" of creditors *who participated in the bankruptcy proceedings*, but only from the claims of creditors "*participating in the distribution of the estate in the bankruptcy proceedings.*"

Whether a line of discrimination between such two classes of creditors is wise or logical is not for us to decide. It is enough that it lies plainly obvious upon the face of the statute. No dividend was paid creditors until after the defendants in error by order of the court had been excluded from participation in the distribution of the estate, and it is stipulated in the agreed case that no payment was made to either of them. The meaning of the proviso is too plain for discussion or interpretation and that the defendants in error did not "participate in the distribution of the estate in the bankruptcy proceedings" is clear. The judgments of the Court of Errors and Appeals of the State of New Jersey must be

Affirmed.

GREAT NORTHERN RAILWAY COMPANY *v.* ALEXANDER, ADMINISTRATOR OF HALL.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 130. Argued January 15, 1918.—Decided March 4, 1918.

A case arising under the Federal Employers' Liability Act between citizens of different States is not removable from a state to a federal District Court on either ground.

In the absence of a fraudulent purpose to defeat removal, the status, with respect to removability, of a case alleged to be one arising under the Federal Employers' Liability Act depends not upon what the defendant may allege or prove or what the court may, after hearing

upon the merits, *in invitum* order, but solely upon the form which the plaintiff voluntarily gives to his pleadings initially and as the case progresses.

Therefore, where the complaint states a cause under the Federal Act, the failure of the plaintiff to prove that the employee was engaged in interstate commerce when injured will not leave the case removable because of diverse citizenship appearing in the complaint. A contention to the contrary is not a claim of federal right of sufficient substance to afford this court jurisdiction to review a state court's judgment.

Writ of error to review 51 Montana, 565, dismissed.

THE case is stated in the opinion.

Mr. I. Parker Veazey, Jr., with whom *Mr. E. C. Lindley* was on the brief, for plaintiff in error.

Mr. C. B. Nolan for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case presents for decision the question whether the non-removable case stated in the complaint became one subject to removal when the plaintiff rested his case and, as the defendant claimed, it became apparent that the allegation of the complaint that the deceased was employed in interstate commerce when killed was not sustained by the evidence.

We shall designate the parties as they were in the trial court, the defendant in error as plaintiff and the plaintiff in error as defendant.

The suit was commenced in a district court of Montana and is one to recover damages for wrongful death. The plaintiff was a citizen of Montana when the case was commenced and he alleges in his complaint, that the defendant was an interstate carrier, organized under the laws of the State of Minnesota at the time the accident occurred; that the deceased was a conductor employed by

the defendant in interstate commerce at the time he was killed, and that the proximate cause of the accident was the failure of defendant to fence its line, which resulted in the derailing of the car on which plaintiff's decedent was employed, causing his instant death.

The defense is a denial that deceased was employed in interstate commerce when injured, and a denial of negligence in the failure to fence, with a plea of assumption of risk.

When the plaintiff rested his case the defendant "moved for a judgment of non-suit and dismissal upon the merits," . . . "based upon the complaint of the plaintiff and upon the testimony adduced."

This motion asserted in various forms that the evidence introduced failed to show any actionable negligence on the part of the defendant and concluded with a fifth paragraph, alleging, in substance, as follows:

That there was a fatal variance, amounting to failure of proof, between the allegation of the complaint that the deceased was employed in interstate commerce at the time he was injured and the evidence introduced; . . . that, this variance is substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said case to the federal court, whereas if the case as made by the proof had been made, to wit, an intrastate case, it could have been removed; and hence the failure to recognize the variance would operate to deny to the defendant a right under a statute or law of the United States, to wit, the right to remove such a case properly pleaded to the federal court.

The trial court having overruled this motion, the defendant introduced its evidence in defense and after the plaintiff's rebuttal was concluded renewed its motion, which was again denied, the defendant reserving its exception, and thereupon the case was submitted to the jury

and judgment was entered on the verdict in favor of the plaintiff.

On review the Supreme Court of Montana held that the trial court had erred, and should have ruled that on the evidence adduced the deceased was not employed in interstate commerce when injured, but holding that the defendant had waived its right to remove by failing to file a petition for removal, as required by law, the court went forward and held that a case of negligence at common law was stated in the complaint, and that the evidence introduced justified the trial court in submitting the case to the jury, and that the judgment must be affirmed.

In disposing of the question presented by this motion for "non-suit and dismissal" which we are considering, the Supreme Court of Montana said:

"We recall but one respect in which a defendant can be seriously prejudiced in such a situation, and that is where, by reason of diverse citizenship, removal of the cause to the federal court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity. . . . . This the appellant did not do; instead, and with the knowledge of its right to have the cause removed, it submitted to the jurisdiction of the state court in which the trial occurred, by seeking a dismissal for variance as well as for failure to show the breach by it of any legal duty to the decedent under either state or federal law."

No claim is made that the allegation that the plaintiff's decedent was employed in interstate commerce was incorporated into the complaint fraudulently or in bad faith, for the purpose of defeating the right of the defendant to remove the case to the federal court.

The claim now made in this court by the defendant is that the state Supreme Court correctly held that the evidence introduced failed to show that the deceased was

employed in interstate commerce when he was injured, but that it committed reversible error and denied to the defendant the federal right to remove the case when it held that the right to remove had been waived, and affirmed the judgment instead of reversing and remanding the case to the lower court for further proceedings.

The plaintiff replies to this claim with the contention that the court is without jurisdiction to review the decision of the state Supreme Court for the reason that no federal right was denied to the plaintiff in error at any stage of the proceeding in the state court.

It is, of course, familiar law that the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress (*Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; Jud. Code, Chap. 3, §§ 28, 39).

The allegation of the complaint that the deceased was employed in interstate commerce when injured brought the case within the scope of the Federal Employers' Liability Act, and it would have been removable either for diversity of citizenship or as a case arising under a law of the United States, except for the prohibition against removal contained in the amendment to the act, approved April 5, 1910, 36 Stat. 291. But this allegation rendered the case, at the time it was commenced, clearly not removable on either ground (*Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599; *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496).

The removal provisions of the Judicial Code, Chapter 3, §§ 28 to 39, inclusive, in effect when this case was tried, were substantially the same as they have been since the Removal Act of 1888 was passed, and that a case not removable when commenced may afterwards become removable is settled by *Ayers* v. *Watson*, 113 U. S. 594; *Martin's Administrator* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 688, 691; *Powers* v. *Chesapeake & Ohio Ry. Co.*,

169 U. S. 92, and *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364. Under the doctrine of these cases the defendant, admitting the non-removable character of the case at bar when it was commenced, argues that the failure of the plaintiff to prove his allegation that the deceased was employed in interstate commerce when he was injured, left the complaint as if the allegation had not been incorporated into it, and that therefore the case became removable for diversity of citizenship when the plaintiff rested his case.

But unfortunately for the validity of this contention it has been frequently decided by this court that whether a case arising, as this one does, under a law of the United States is removable or not, when it is commenced (there being no claim of fraudulent attempt to evade removal,) is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Chappell* v. *Waterworth*, 155 U. S. 102; *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 606; *Taylor* v. *Anderson*, 234 U. S. 74.

It is also settled that a case, arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. *Kansas City &c. Ry. Co.* v. *Herman*, 187 U. S. 63; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Lathrop, Shea & Henwood Co.* v. *Interior Construction Co.*, 215 U. S. 246; *American Car & Foundry Co.* v. *Kettelhake*, 236 U. S. 311.

The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

The result of the application of this principle to the case at bar is not doubtful.

The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case and in his brief in this court still contends that the allegation was supported by the evidence. The first holding to the contrary was by the state Supreme Court and the most that can be said of that decision is that the defendant prevailed in a matter of defense which it had pleaded, but, as we have seen, this does not convert a non-removable case into a removable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant did not at any time have the right to remove the case to the federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana and the writ of error must be

Dismissed.

NORTHERN PACIFIC RAILWAY COMPANY *v.* WISMER, SUBSTITUTED FOR WISMER.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 152. Argued January 28, 29, 1918.—Decided March 4, 1918.

Lands opposite the line of the Northern Pacific Railroad Company constituting an Indian reservation when the line was definitely located, were not embraced in the grant of odd numbered sections made to the company by the Act of July 2, 1864, c. 217, 13 Stat. 365.

A reservation of public lands for and exclusively devoted to the occupancy of a tribe of Indians, made under the direction and with the approval of the Commissioner of Indian Affairs, and expressly or tacitly approved by the Secretary of the Interior, *held* valid and effectual to exclude the lands from the Northern Pacific grant, although not formally sanctioned by the President until after the railroad had filed its plat of definite location.

230 Fed. Rep. 591, affirmed.

THE case is stated in the opinion.

Mr. Charles Donnelly, with whom *Mr. Charles W. Bunn* was on the brief, for plaintiff in error.

Mr. Assistant Attorney General Kearful for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This suit is one in ejectment by the Northern Pacific Railway Company to recover possession of eighty acres of land (the title to 64,000 acres depends upon the decision), and it is here on writ of error to review the judgment of the Circuit Court of Appeals, affirming that of the District Court in favor of the defendant.

The principles of law applicable to the case are few and well settled and the decision of it depends upon the interpretation to be given to stipulated facts.

The plaintiff in error is the successor in interest to the Northern Pacific Railroad Company, and the defendant in error, substituted for the deceased defendant, George F. Wismer, claims to own the land in controversy by virtue of a homestead entry made in 1910, upon which a patent was issued in 1913.

By act of Congress dated July 2, 1864, 13 Stat. 365, there was granted to the Northern Pacific Railroad Company, for the purpose of aiding in the construction of its line to the Pacific Coast, twenty alternate odd-numbered sections of land per mile on each side of the railroad line, which it should locate and adopt, within the boundaries of any Territory and ten alternate odd-numbered sections per mile on each side of the railroad line, which it should adopt, within the boundaries of any State. The grant embraces only lands to which, "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed."

On October 4, 1880, the Railroad Company definitely located the position of its line opposite the land in controversy and filed a plat thereof, as required by law, and it is claimed that upon the filing of this plat the company became entitled to the lands granted, including those of the defendant in error, as of July 2, 1864, the date of the granting act of Congress.

The claim of the defendant in error, which prevailed in each of the lower courts, is that the land in controversy was reserved or otherwise appropriated, within the meaning of the terms of the grant to the Railroad Company of 1864, quoted above, at the time this part of the line of the railroad was definitely located, for the reason that it was then within an Indian Reservation, or was subject to an

Indian claim, which prevented the grant attaching to it, by virtue of the following facts, which we condense from the stipulation between the parties.

Prior to August 16, 1877, bands of Indians of the Spokane and other tribes occupied, for hunting and fishing, the extensive territory now comprising the eastern part of the State of Washington, in which they had not then ceded to the United States any part of their rights. In the spring of that year certain of these Indian tribes commenced hostilities against the white settlers which resulted in war with the United States, in which they were urging the Spokane tribe, then at peace, to join.

On May 7, 1877, the Commissioner of Indian Affairs directed Col. E. C. Watkins, an Indian Inspector, in charge of all agencies in Washington Territory, to give his "special attention" to the subject of gathering the roving Indians "upon permanent reservations," with the result that on August 16, 17, 18, 1877, a Council was held at Spokane Falls, Washington, between the Chiefs and Headmen of the Spokane tribe of Indians and Colonel Watkins, acting "in his official capacity as Indian Inspector, representing the Department of the Interior," and General Frank Wheaton, and Captain M. C. Wilkinson, of the United States Army, representing the Department of War.

It is expressly stipulated "that for the purpose of collecting the said Indians belonging to the said tribe (the Spokane tribe) on a reservation," and of inducing them: to establish homes and to engage in agricultural pursuits; to extinguish their title "to all other lands not within the said reservation" and to remain at peace with the United States, the agreement following was signed by the representatives of the Government of the United States and the Chiefs and Headmen of the tribe who attended the Council, viz:

"In Council at Spokane Falls, W. T. August 18th, 1877.

"We, the undersigned Chiefs and head men of the Spokané Tribe of Indians for ourselves and our people hereby agree to accept the following described land for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

"And we do further agree to go upon the same by the first of November next with a view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder."

On August 23 Col. Watkins reported the result of the Council to his superior officer, the Commissioner of Indian Affairs, and sent him a copy of the executed agreement, with his recommendation that the territory described therein should be set apart and reserved for the Spokane tribe.

Immediately after the signing of this agreement and prior to November 14th of the same year, Col. Watkins, still "acting in his official capacity, located such of the said Spokane Indians as were not already residing thereon upon said *reservation*" described in the agreement, and on November 26, 1877, he reported this action to his superior, the Commissioner of Indian Affairs, who communicated it to the Secretary of the Interior, with his approval, on December 29, 1877, who, in turn, communicated it to the United States Senate on January 23, 1878.

The Indians remained at peace with the United States and continued in the use and occupancy of the lands described in the agreement and claimed the same "as their reservation" until the year 1910.

The encroachment of squatters upon the land thus reserved resulted in an order by Brigadier General Howard on September 3, 1880, directing that the military force under his command should protect the territory described in the agreement of August, 1877, against settlement by others than the Spokane Indians until survey of the land should be made or until further instructions.

On January 18, 1881, President Hayes, by Executive Order, formally set aside and reserved the territory described in the agreement of August, 1877, for the use and occupancy of the Spokane Indians.

The Indians occupied the reservation until after the Act of May 29, 1908, was passed (35 Stat. 458) directing that the Secretary of the Interior should cause allotments to be made, under the allotment laws, to all Indians having tribal rights and belonging to the Spokane Indian Reservation who had not theretofore received allotments, and providing that the surplus agricultural lands should be opened for settlement and entry under the homestead laws, and that the net proceeds derived from the sale of such lands should be deposited in the United States Treasury to the credit of the Indians of the Spokane Reservation. It was under the provisions of this act that the decedent of the defendant in error obtained his patent.

This summary of the stipulated facts points to the inevitable decision of the case.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, was charged with the management of all Indian affairs and matters arising out of Indian relations (Rev. Stats., §§ 441, 463, 2058, 2149), and clearly he commissioned Col. Watkins in advance to treat with the Spokane tribe for the setting apart to them of a permanent reservation through an agreement such as that of August, 1877. The plaintiff in error concedes, as it must, that if the Secretary of the Interior approved the action taken by Colonel Watkins prior to the filing

of the plat of its line on October 4, 1880, the reservation must be considered as lawfully established and the lands thereby removed beyond the scope of the grant to the Railroad Company. (*Wilcox* v. *Jackson*, 13 Pet. 498, 512; *Wolsey* v. *Chapman*, 101 U. S. 755, 769; *Wood* v. *Beach*, 156 U. S. 548; *United States* v. *Midwest Oil Co.*, 236 U. S. 459; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, 357.) And reservations made by heads of bureaus, such as the Commissioner of the General Land Office, or the Commissioner of Indian Affairs, in the administration of the matters committed to their charge, stand upon the same footing where the Secretary of the Interior is informed of their action and where, as in this case, he either expressly or tacitly approves the same. *Spencer* v. *McDougal*, 159 U. S. 62.

Such being the law, we cannot doubt that the sound inference from the stipulated facts as we have stated them is that, with full understanding of the situation the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railway company's plat, and that the Executive Order of the President on January 18, 1881, simply continued and gave formal sanction to what had been done before.

That the reservation was in fact made and the lands exclusively devoted to the use of the Indians from the date of the agreement of August, 1877, is beyond controversy; that no objection was ever made by his superiors to the action taken by Colonel Watkins is equally clear, and to hold that, for want of a formal approval by the Secretary of the Interior, all of the conduct of the Government and of the Indians in making and ratifying and in good faith carrying out the agreement between them, even to the extent of protecting the reservation by mil-

itary forces from intrusion, is without effect, would be to subordinate the realities of the situation to mere form, for the delay in the issuing of the formal Executive Order of the President under the circumstances can be attributed only to the exigencies of the public business;—by his representative, the Secretary of the Interior, he had approved the setting apart of the lands to the use of the Indians almost three years before.

The judgment of the Circuit Court of Appeals will be affirmed for the reason that the Spokane Indian Reservation was lawfully created prior to the filing of the plat of the line of the plaintiff company on October 4th, 1880.

Affirmed.

CISSNA v. STATE OF TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 20. Argued November 10, 1916; restored to docket for reargument December 11, 1916; reargued October 9, 10, 1917.—Decided March 11, 1918.

If the state supreme court treats federal questions as necessarily involved and to reach its judgment necessarily decides them adversely to the plaintiff in error, this court has jurisdiction to review them, although not specially characterized as federal questions by the plaintiff in error in the state courts.

This court has jurisdiction to review a judgment of the supreme court of a State where the issues as to whether lands in question were owned by the State, and whether they, and alleged trespasses upon them, were within the State and so within the state court's jurisdiction, were determined affirmatively through a location of the state boundary based upon interpretation of various treaties and acts of Congress.

Whether two States of the Union, either by long acquiescence in a

practical location of their common boundary or by agreement otherwise evidenced, have changed the limits of their jurisdiction as laid down by the authority of the general government in treaty or statute, is in its nature a federal question.

Whether the state court has correctly followed the rules of erosion, accretion or avulsion applicable to interstate boundary streams so as to give proper effect to treaties and acts of Congress establishing a river as an interstate boundary, is a question of federal law.

Upon the merits, which concern the location of the boundary between Tennessee and Arkansas in the Mississippi River, this case is decided upon the authority of *Arkansas* v. *Tennessee*, *ante*, 158.

119 Tennessee, 47, reversed.

THE case is stated in the opinion.

Mr. Caruthers Ewing for plaintiff in error.

Mr. John P. Bullington, with whom *Mr. Frank M. Thompson*, Attorney General of the State of Tennessee, was on the briefs, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The State of Tennessee sued Cissna and others in a court of equity of that State, setting up ownership by the State of that portion of the dry lands formerly a part of the bed of the Mississippi River which lay between low-water mark on the Tennessee side and the middle of the river as it flowed prior to the change in the channel made in the year 1876 by the opening of the Centennial Cut-off; alleging that the defendant Cissna claiming ownership, but having none, and the Muncie Pulp Company acting under him, were cutting and removing timber from a particularly described portion of those lands; and praying for an injunction against further acts of trespass and against the removal of the timber cut, and a recovery of the value of the timber. Cissna pleaded in abatement that the land described in the bill, except a small portion to

which he disclaimed title, was in the State of Arkansas and not in the State of Tennessee, and hence that the court had no jurisdiction over the controversy. His codefendant having raised a similar issue, the cause came on to be heard before a chancellor, who sustained the pleas to the jurisdiction and ordered that the bill be dismissed. Upon appeal, the Supreme Court of Tennessee, disregarding the form of the pleadings, treated the action as brought to recover the land as well as to stay waste in cutting and removing timber; and deeming that the question of jurisdiction which depended upon the location of the boundary line between Tennessee and Arkansas and the question of the right of the former State to recover the land were practically the same question, considered them together. The facts bearing upon the location of the boundary, recited in the opinion of the court, were substantially the same as those upon which this court passed in the boundary suit of *Arkansas* v. *Tennessee*, No. 4 Original, recently decided, *ante*, 158. The state court held, contrary to the rule laid down by this court in *Iowa* v. *Illinois*, 147 U. S. 1, and still adhered to, that the boundary line did not follow the middle of the channel of commerce, but was fixed and defined as "a line along the middle of the main channel of the river equidistant from the visible and permanent banks confining its waters." The court found that the change made in the channel in the year 1876 at Centennial Cut-off was an avulsion, and declared that "the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel." But, not carrying this into effect, it concluded that at the place where the lands sued for are situate the correct boundary between the States was midway between the banks of the river as they existed in the year 1823 as shown by the Humphreys map, notwith-

standing the fact that between that date and the time of the cut-off the river had gradually encroached upon the Tennessee shore, to a large extent in the aggregate; the court holding that the effect of the avulsion was to press back the line between the two States so as to restore to Tennessee what it held before the erosions upon its banks. And since it appeared that complainant had sued only for the land lying on the hither side of the middle of the channel as it was in 1876, and therefore could not recover to the middle of the channel of 1823, the court, on remanding the cause for a hearing upon the answers of defendants, ordered that the bill might be amended so as to make the proper averments to enable the State to recover under the principles laid down in its opinion. *State* v. *Muncie Pulp Co.*, 119 Tennessee, 47.

The cause was remanded, the pleadings were amended, and the suit remained pending in the trial court, when the State of Arkansas filed its bill in this court against the State of Tennessee to settle the boundary line between these States along that part of the former bed of the Mississippi River which was left dry as a result of the avulsion of 1876, including the portion in dispute in the present case; this being the same action above mentioned as No. 4, Original. The pendency of that action was brought by Cissna to the attention of the trial court in the present case, and made the basis of an application for a stay of proceedings until the boundary line between the States should have been fixed and located by this court. This application was overruled and the cause proceeded, with the result that the chancellor made a decree against Cissna on the merits in conformity with the opinion of the Supreme Court, subject however to an accounting with respect to the amount and value of the timber cut and removed during the pendency of the suit. Upon appeal to the Supreme Court this decree was affirmed, with modifications not necessary to be mentioned, that

court ordered that a writ of possession be issued to place the complainant State in possession of the tract of land in controversy, and retained the case for an accounting respecting the value of the timber. By way of objection to the entry of a decree pursuant to the accounting that followed, Cissna again called the attention of the court to the boundary suit pending in this court, and prayed for a stay of proceedings in the suit against him upon the ground that any determination by that court not in accordance with the determination of this court would be void. This objection was overruled, a final judgment or decree went against him for upwards of $110,000, and the case was brought here by writ of error under § 237, Judicial Code (36 Stat. 1156, c. 231), before the amendment of September 6, 1916, c. 448, 39 Stat. 726.

It was first argued at the October Term, 1916, when, for reasons stated in 242 U. S. 195, it was restored to the docket, and thereafter was heard at the same time with the suit of *Arkansas* v. *Tennessee*.

Our jurisdiction is invoked upon the ground that the decision of the state court of last resort was adverse to the federal rights of plaintiff in error in two respects: (1) in overruling his prayer for a stay of proceedings to await the determination of the suit pending in this court to settle the boundary line between the States; and (2) in coming to an erroneous conclusion upon the merits of the question of the proper location of that boundary. We need not pass upon the first point, since we are of the opinion that we have jurisdiction on the second ground, and that the judgment under review must be reversed.

The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the State treated federal questions as

necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257; *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, 49.

The opinion of that court (119 Tennessee, 47) shows that it treated the question of jurisdiction presented by the pleas in abatement and the question of the title of the State of Tennessee to the lands in controversy as both dependent upon the location of the boundary, because the State claimed the lands as a sovereign under the same treaties and acts of Congress by which its western boundary was defined and established; and the court held that the location of this boundary depended upon the interpretation of the Treaty of 1783 between the United States and Great Britain (8 Stat. 80, 82, Art. II), the act of cession from North Carolina to the United States made in 1790 (1 Stat. 106, c. 6), the Treaty of 1795 between the United States and Spain (8 Stat. 138, 140, Art. IV), the Act of Congress of June 1, 1796, admitting Tennessee into the Union as a State (1 Stat. 491, c. 47), the Louisiana Purchase Treaty of 1803 (8 Stat. 200), and the Act of Congress of June 15, 1836, c. 100, 5 Stat. 50, admitting Arkansas as a State. Upon a consideration of the Treaty of 1783, which employed the expression "middle of the said River Mississippi" to define the western boundary of the United States, and interpreting this in view of the use of the same expression in the previous Treaty of 1763 between Great Britain, France, and Spain (3 Jenkinson's Treaties, 177), and declaring that the treaty with Spain, which provided that the western boundary of the United States should be "in the middle of the channel or bed of the river," was not only an interpretation of the former treaties, but superseded them, and construing the phrase "middle of the main channel," employed in the act ad-

mitting Arkansas, as introducing no new meaning, the court held that the expression "middle of the river," by true interpretation, meant not the middle of the channel of commerce, but a line midway between the visible and fixed banks of the stream, and that any general rule of international law to the contrary must yield to the intent which the court deemed to be expressed in the treaties and acts of Congress referred to.

Since the decision adverse to plaintiff in error turned so clearly and essentially upon questions of federal law, we have jurisdiction to review the resulting judgment. And as the conclusion reached by the state court upon the question of interpretation is directly opposed to that reached by us in *Arkansas* v. *Tennessee* upon a consideration of the same pertinent treaties and acts of Congress, we need only refer to our opinion in that case for a statement of the grounds upon which we hold that the state court erred.

Two additional errors entered into the judgment, so intimately connected with the question of interpretation as to be inseparable from it.

The first of these was a decision to the effect that the question of boundary had been settled by the duly constituted authorities of the two States, by judicial decisions, legislation, long acquiescence, exercise of jurisdiction, and other acts amounting to an agreement or convention defining the limit between the States to be the line midway between the visible banks of the river. Obviously, whether two States of the Union, either by long acquiescence in a practical location of their common boundary, or by agreement otherwise evidenced, have definitely fixed or changed the limits of their jurisdiction as laid down by the authority of the general Government in treaty or statute, is in its nature a federal question. We have stated briefly, in *Arkansas* v. *Tennessee*, the reasons why we are unable to concur with the state court in its decision upon this point.

The remaining error arose in the determination of the consequences of the avulsion of 1876. It is a part of the law of interstate boundaries, that where a running stream forms the boundary, if the bed and channel are changed by the natural and gradual processes of erosion and accretion, the boundary follows the varying course of the stream; while if the stream suddenly leaves its old bed and forms a new one, the resulting change of channel works no change of boundary, which remains in the middle of the old channel although no water be flowing in it. *Arkansas* v. *Tennessee, supra.* A correct application of this rule to changes in the Mississippi is necessary in order that proper effect may be given to the treaties and acts of Congress by which that river was established as an interstate boundary, and hence this is a question of federal law. The state court acknowledged the rule in theory, but departed from it in fact. Starting with the Humphreys map as showing the location of the banks of the river as they were in 1823, the date to which the earliest records related, and finding from the evidence that between that date and the time of the avulsion there had been gradual erosions from the Tennessee bank at the place where the land in controversy is situate, to an extent sufficient in the aggregate to increase the width of the river from a little less than a mile to between 1¼ and 1½ miles, the court held that the subsequent emergence of the bed of the river at this place, consequent upon the avulsion of 1876, had the effect of pressing back the line between the States to the middle of the old channel as it ran in 1823, so as to restore to Tennessee what it held before the erosions from its banks. This result was reached by grafting upon the acknowledged rule as to boundary streams an exception deduced from the rule of the common law that lands once swallowed by the sea, if afterwards exposed by its recession, are restored to the former owner if they can be identified. As we have pointed out in

Arkansas v. *Tennessee*, it is a misapplication of this doctrine to treat it as forming an exception to the established rule respecting the effect of erosion, accretion, and avulsion upon the course of a boundary stream.

We conclude, therefore, that the court erred in awarding to the State of Tennessee a recovery of any land or damages for cutting and removing timber from any land lying without the limits of the State as defined in our opinion in *Arkansas* v. *Tennessee*, *supra*, being a line drawn along the middle of the main channel of navigation of the Mississippi River (as distinguished from a line midway between the visible and fixed banks of the stream) as it was at the time when the current ceased to flow therein as a result of the avulsion of 1876, and without regard to changes in the banks or channel that had occurred through the natural and gradual processes of erosion and accretion prior to the avulsion.

It results that the judgment of the state court must be *Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.*

OETJEN *v.* CENTRAL LEATHER COMPANY.

ERROR TO THE CIRCUIT COURT OF HUDSON COUNTY, STATE OF NEW JERSEY.

Nos. 268, 269. Argued January 3, 4, 1918.—Decided March 11, 1918.

The court notices judicially that the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917.

Semble, that the Hague Conventions, in view of their terms and international character, do not apply to a civil war, and that the regula-

tions annexed to the Convention of 1907 do not forbid such a military seizure and sale of private property as is involved in this case.

The conduct of our foreign relations is committed by the Constitution to the executive and legislative—the political—departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

Who is the sovereign *de jure* or *de facto* of a foreign territory is a political question the determination of which by the political departments of the Government conclusively binds the judges.

When a government which originates in revolution or revolt is recognized by the political department of our Government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.

Every sovereign State is bound to respect the independence of every other sovereign State and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court as to claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency.

In January, 1914, General Francisco Villa, while conducting independent operations as a duly commissioned military commander of the Carranza Government, which had then made much progress in its revolution in Mexico, levied a military contribution and, in enforcing it, seized and sold some hides then owned and possessed by a citizen of Mexico. *Held*, that the act could not be reëxamined and modified by a New Jersey court in replevin.

87 N. J. L. 552, 704, affirmed.

THE cases are stated in the opinion.

Mr. John M. Enright, with whom *Mr. Oscar R. Houston* and *Mr. James D. Carpenter, Jr.*, were on the brief, for plaintiff in error.

Mr. Eli J. Blair, with whom *Mr. Frank H. Platt* was on the brief, for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases involving the same question, were argued and will be decided together. They are suits in replevin and involve the title to two large consignments of hides, which the plaintiff in error claims to own as assignee of Martinez & Company, a partnership engaged in business in the city of Torreon, Mexico, but which the defendant in error claims to own by purchase from the Finnegan-Brown Company, a Texas corporation, which it is alleged purchased the hides in Mexico from General Francisco Villa, on January 3, 1914.

The cases were commenced in a Circuit Court of New Jersey, in which judgments were rendered for the defendants, which were affirmed by the Court of Errors and Appeals, and they are brought to this court on the theory, that the claim of title to the hides by the defendant in error is invalid because based upon a purchase from General Villa, who, it is urged, confiscated them contrary to the provisions of the Hague Convention of 1907 respecting the laws and customs of war on land; that the judgment of the state court denied to the plaintiff in error this right which he "set up and claimed" under the Hague Convention or treaty; and that this denial gives him the right of review in this court.

A somewhat detailed description will be necessary of the political conditions in Mexico prior to and at the time of the seizure of the property in controversy by the military authorities. It appears in the record, and is a matter of general history, that on February 23, 1913, Madero, President of the Republic of Mexico, was assassinated; that immediately thereafter General Huerta declared himself Provisional President of the Republic

and took the oath of office as such; that on the twenty-sixth day of March following General Carranza, who was then Governor of the State of Coahuila, inaugurated a revolution against the claimed authority of Huerta and in a "Manifesto addressed to the Mexican Nation" proclaimed the organization of a constitutional government under "The Plan of Guadalupe," and that civil war was at once entered upon between the followers and forces of the two leaders. When General Carranza assumed the leadership of what were called the Constitutionalist forces he commissioned General Villa his representative, as "Commander of the North," and assigned him to an independent command in that part of the country. Such progress was made by the Carranza forces that in the autumn of 1913 they were in military possession, as the record shows, of approximately two-thirds of the area of the entire country, with the exception of a few scattered towns and cities, and after a battle lasting several days the City of Torreon in the State of Coahuila was captured by General Villa on October 1 of that year. Immediately after the capture of Torreon, Villa proposed levying a military contribution on the inhabitants, for the support of his army, and thereupon influential citizens, preferring to provide the required money by an assessment upon the community to having their property forcibly seized, called together a largely attended meeting and, after negotiations with General Villa as to the amount to be paid, an assessment was made on the men of property of the city, which was in large part promptly paid. Martinez, the owner from whom the plaintiff in error claims title to the property involved in this case, was a wealthy resident of Torreon and was a dealer in hides in a large way. Being an adherent of Huerta, when Torreon was captured Martinez fled the city and failed to pay the assessment imposed upon him, and it was to satisfy this assessment that, by order of General Villa, the hides in controversy

were seized and on January 3, 1914, were sold in Mexico to the Finnegan-Brown Company. They were paid for in Mexico, and were thereafter shipped into the United States and were replevied, as stated.

This court will take judicial notice of the fact that, since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico, on October 19, 1915, and as the *de jure* government on August 31, 1917. *Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250.

On this state of fact the plaintiff in error argues that the "Regulations" annexed to the Hague Convention of 1907 "Respecting Laws and Customs of War on Land" constitute a treaty between the United States and Mexico; that these "Regulations" forbid such seizure and sale of property as we are considering in this case; and that, therefore, somewhat vaguely, no title passed by the sale made by General Villa and the property may be recovered by the Mexican owner or his assignees when found in this country.

It would, perhaps, be sufficient answer to this contention to say that the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war. Were it otherwise, however, it might be effectively argued that the declaration relied upon that "private property cannot be confiscated" contained in Article 46 of the Regulations does not have the scope claimed for it, since Article 49 provides that "money contributions" . . . "for the needs of the army" may be levied upon occupied territory, and Article 52 provides that "Requisitions in kind and services shall not be demanded . . . except for the needs of the army of occupation," and that contributions in kind shall, as far as possible, be

paid for in cash, and when not so paid for a receipt shall be given and payment of the amount due shall be made as soon as possible. And also for the reason that the "Convention" to which the "Regulations" are annexed, recognizing the incomplete character of the results arrived at, expressly provides that until a more complete code is agreed upon, cases not provided for in the "Regulations" shall be governed by the principles of the law of nations.

But, since claims similar to the one before us are being made in many cases in this and in other courts, we prefer to place our decision upon the application of three clearly settled principles of law to the facts of this case as we have stated them.

The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *United States* v. *Palmer*, 3 Wheat. 610; *Foster* v. *Neilson*, 2 Pet. 253, 307, 309; *Garcia* v. *Lee*, 12 Pet. 511, 517, 520; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *In re Cooper*, 143 U. S. 472, 499. It has been specifically decided that "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." *Jones* v. *United States*, 137 U. S. 202, 212.

It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de*

jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Williams* v. *Bruffy*, 96 U. S. 176, 186; *Underhill* v. *Hernandez*, 168 U. S. 250, 253. See *s. c.* 65 Fed. Rep. 577.

To these principles we must add that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill* v. *Hernandez*, 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to reëxamination and modification by the courts of this country.

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest

considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reëxamination by this or any other American court.

The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our Government. The judgments of the Court of Errors and Appeals of New Jersey must be

Affirmed.

RICAUD ET AL. *v.* AMERICAN METAL COMPANY, LIMITED.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 119. Submitted January 3, 1918.—Decided March 11, 1918.

The requirement that a certificate from the Circuit Court of Appeals shall contain a "proper statement of the facts on which the questions and propositions of law arise," (Rule 37) is not complied with by a statement of what is "alleged and denied" by the parties in their pleadings, supplemented by a statement that there was evidence tending to establish the facts as claimed by each party; nor should the questions be based upon an "assumed" statement of facts.

Facts supplied by judicial notice may enable the court to answer questions from the Court of Appeals, where otherwise the insufficiency of the certificate would necessitate its return to that court.

A bill in the District Court for the Western District of Texas, besides showing diverse citizenship, alleged that certain personal property of the plaintiff had been forcibly taken from its possession in Mexico by unknown persons, was consigned to one of the defendants at El Paso, and was in a bonded warehouse there in the possession of another defendant, as Collector of Customs, who, unless restrained as prayed, would deliver it to the other defendants. *Held*, that the case, as thus stated, was within the jurisdiction of the District Court, and that the facts, not mentioned in the bill, that the property had been seized, condemned and sold for war purposes by the Constitutionalist forces in revolution in Mexico, acting under authority of General Carranza, whose government was later recognized by the United States, did not deprive the courts of jurisdiction to adjudicate upon the validity of the title thus acquired, though in exercising the jurisdiction the action of the Mexican authorities must necessarily be accepted as a rule of decision. *Oetjen* v. *Central Leather Co.*, *ante*, 297.

The fact that property seized and sold by the authorities of a foreign government belonged to an American citizen, not residing in the foreign country at the time, does not empower a court of this country to reëxamine and modify their action.

THE case is stated in the opinion.

Mr. F. E. Hunter and *Mr. R. B. Redic* for Ricaud *et al.*

Mr. R. C. Walshe, Mr. U. S. Goen, Mr. Julius Goldman and *Mr. Julian B. Beaty* for American Metal Co., Ltd.

Mr. Charles D. Hayt, Mr. Clyde C. Dawson and *Mr. Fred R. Wright*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this suit in equity, commenced in the United States District Court for the Western District of Texas, the plaintiff in that court claims to be the owner of and entitled to a large consignment of lead bullion held in bond by the

Collector of Customs at El Paso, Texas. An injunction was granted restraining the Collector until further order from delivering the bullion to either of the other defendants.

Barlow, one of the defendants in the District Court, claims to be the owner of the property by purchase from the defendant Ricaud, who it is claimed purchased it from General Pereyra, who in the year 1913 was the commander of a brigade of the Constitutionalist Army of Mexico of which Venustiano Carranza was then First Chief.

It is not seriously disputed that General Pereyra, in his capacity as a commanding officer, in September, 1913, demanded this bullion from the Penoles Mining Company, a Mexican corporation doing business at Bermejillo, Mexico; that when it was delivered to him he gave a receipt which contains a promise to pay for it "on the triumph of the revolution or the establishment of a legal government"; that Pereyra sold the bullion to defendant Ricaud, who sold it to the defendant Barlow; that the proceeds of the sale were devoted to the purchase of arms, ammunition, food and clothing for Pereyra's troops, and that Pereyra in the transaction represented and acted for the Government of General Carranza, which has since been recognized by the United States Government as the *de jure* Government of Mexico.

The plaintiff, appellee here, claims to have purchased the bullion from the Penoles Mining Company in June, 1913.

The District Court rendered a decree in favor of the plaintiff from which defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court certifies three questions as to which it desires the instruction of this court.

The sufficiency of the certificate of the Circuit Court of Appeals is challenged at the threshold.

There is no denying that there is much of merit in the objection to the form of this certificate, including the form of the questions, for the reason that the certificate, instead of containing a "proper statement of the facts on which the questions and propositions of law arise," as is required by Rule 37 of this court, contains a statement of what is "alleged and denied" by the parties plaintiff and defendant in their pleadings, with the additional statement that there was evidence "tending to establish the facts as claimed by each party," but without any finding whatever as to what the evidence showed the facts to be, and the first question, on which the other two depend, is in terms based entirely on an "assumed" statement of facts.

If this certificate had not been supplemented by the recognition by the United States Government of the Government of Carranza, first as the *de facto*, and later as the *de jure* Government of Mexico, of which facts this court will take judicial notice, (*Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250) it would be our duty to declare the certificate insufficient and to return it to the Circuit Court of Appeals without answering the questions. *Cincinnati, Hamilton & Dayton R. R. Co.* v. *McKeen*, 149 U. S. 259; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 422.

But this recognition of the government under which General Pereyra was acting, as the legitimate Government of Mexico, makes the answers to the questions so certain and its effect upon the case is so clear, that, for the purpose of making an end of the litigation, we will proceed to answer the questions.

The first question is:

"I. Assuming that the bullion in suit was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority

from General Carranza, claiming to be the Provisional President of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation, and sale by the Carranza forces as against an American citizen claiming ownership of the said bullion prior to its seizure?"

There can be no doubt that the required diversity of citizenship to give the District Court jurisdiction of the case was stated in the petition for injunction. The certificate shows that it was alleged in the petition that the bullion was the property of the plaintiff and that it had been forcibly taken from its possession in Mexico by unknown persons but without any reference being made to a state of war prevailing therein at the time; that it was consigned to defendant Barlow at El Paso, Texas, and was in a bonded warehouse in the possession of the defendant Cobb, as Collector of Customs, who, unless restrained by the court, would deliver it to the other defendants.

This form of petition brought the case within the jurisdiction of the District Court (*United States* v. *Arredondo*, 6 Pet. 691, 709; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632), and the question is, whether the circumstance that the bullion was seized, condemned and sold under the conditions stated in the question deprived the court of jurisdiction to go forward and adjudge as to the validity of the title acquired by the seizure and sale by the Carranza forces.

The answer which should be given to this question has been rendered not doubtful by the fact that, as we have said, the revolution inaugurated by General Carranza against General Huerta proved successful and the government established by him has been recognized by the

political department of our Government as the *de facto* and later as the *de jure* Government of Mexico, which decision binds the judges as well as all other officers and citizens of the Government. *United States* v. *Palmer*, 3 Wheat. 610; *In re Cooper*, 143 U. S. 472; *Jones* v. *United States*, 137 U. S. 202. This recognition is retroactive in effect and validates all the actions of the Carranza Government from the commencement of its existence (*Williams* v. *Bruffy*, 96 U. S. 176, 186; *Underhill* v. *Hernandez*, 168 U. S. 250, 253), and the action of General Pereyra complained of must therefore be regarded as the action, in time of civil war, of a duly commissioned general of the legitimate Government of Mexico.

It is settled that the courts will take judicial notice of such recognition, as we have here, of the Carranza Government, by the political department of our Government (*Jones* v. *United States*, 137 U. S. 202), and that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory (*Underhill* v. *Hernandez*, 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Oetjen* v. *Central Leather Co.*, *ante*, 297). This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico and that giving effect to this rule is an exercise of jurisdiction which requires that the first question be answered in the affirmative.

The second question reads:

"II. If [the first question is answered in the affirmative,] does the subsequent recognition by the United States Government of Carranza as the legitimate President of the Republic of Mexico and his government as the only legitimate government of the Republic of Mexico deprive this court of jurisdiction on this appeal to decide and adjudge the case on its merits?"

Our answer to the first requires a negative answer to this second question.

The third question reads:

"III. If question two is answered in the negative, did the seizure, condemnation, and sale of the bullion in the manner and for the purposes stated to be assumed in question one have the effect of divesting the title to or ownership of it of a certain citizen of the United States of America not in or a resident of Mexico when such seizure and condemnation occurred?"

The answer to this question must be in the affirmative for the reasons given and upon the authorities cited in the opinion recently announced in cases Nos. 268 and 269, *Oetjen* v. *Central Leather Co.* The fact that the title to the property in controversy may have been in an American citizen, who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate Government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign State cannot become the subject of reëxamination and modification in the courts of another. Such action, when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country. Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our Government. The first and third questions will be answered in the affirmative and the second in the negative.

And it is so ordered.

STADELMAN ET AL. *v.* MINER ET AL.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 644. Petition for rehearing. Leave to file granted, petition allowed and former dismissal vacated March 18, 1918.

The case having been dismissed for want of a federal question, the court grants leave to file, and treats as filed, a petition for rehearing and orders that the case stand for consideration on the prior submission, the fact that a federal question was raised and decided on a former hearing in the state court being shown by the official report of its opinion and the failure of counsel to include that opinion in the record, as should have been done, or to refer to the decision in their briefs and arguments, being due to excusable inadvertence.

Mr. John M. Gearin and *Mr. Harry G. Hoy*, for plaintiffs in error, in support of the petition.

Memorandum opinion by direction of the court, by MR. CHIEF JUSTICE WHITE.

There being nothing in the record to establish that the federal question relied upon was raised, considered or decided below, and indeed it appearing so far as the record is concerned that the federal question was for the first time stated in the assignments made for the purpose of the writ of error from this court, the case was dismissed for want of jurisdiction upon authorities cited. 245 U. S. 636. On this application it is stated that in a previous hearing of the case in the court below the federal question relied upon in this court was pressed and moreover was expressly decided, reference being made to the opinion so showing reported in 83 Oregon, 351. The application for leave prays that the clerk below be directed

[1] See *post*, 544.

to certify the opinion as part of the record and thus correct the inadvertence in not having previously included it and the oversight of counsel in not having referred to it in their briefs or arguments as affording in this court the basis of authority to review.

As the opinion referred to establishes that the federal question was considered and decided and as that opinion should have properly been included in the record, it follows that if the mistake of the parties in failing to include or refer to it be overlooked and corrected, which we think should be done, it would result also that the ground upon which the order of dismissal was made would be without foundation and therefore should be set aside. To that end leave to file the petition is granted and, acting upon it as filed, our former judgment of dismissal will be set aside and the case will stand for consideration under the prior submission. Moreover, for the purpose of disposing of the cause, the opinion of the court below rendered on the previous hearing will be considered as part of the record without further formal order to the court below to supply the same.

And it is so ordered.

ROCK SPRING DISTILLING COMPANY ET AL. *v.* W. A. GAINES & COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued January 31, February 1, 1918.—Decided March 18, 1918.

Under the common law and the federal registration statute (February 20, 1905, c. 592, 33 Stat. 724) a trademark for one variety of goods includes other varieties of the same species.

An adjudication that, as against B, A is entitled, by prior appropria-

tion, to use a trademark on "blended" whiskey, protects A, as against B, in its use on "straight" whiskey.

G, claiming a trademark by prior adoption and use and by registration under the Act of February 20, 1905, *supra*, in connection with the manufacture in Kentucky and extensive sale of "straight" whiskies, sued R to enjoin the use of the mark on "straight" whiskey manufactured in that State. R, claiming to be acting as the agent of H, set up in bar a decree of the Circuit Court in Missouri, directed by the Circuit Court of Appeals, dismissing the bill in a former suit brought by G against the predecessors of H to enjoin them from using the same mark on "blended" whiskey, which they had been producing and selling under it, in a limited way, at St. Louis. *Held*, reviewing the pleadings in the former case and the findings and conclusions of the Circuit Court of Appeals as displayed in its opinion, (1) that the issues as to the common-law right were the same in both cases; (2) that the former decree established against G, in favor of the predecessors of H, a title by prior appropriation, and not merely a defensive right limited to the type of whiskey ("blended") they were selling and to the volume and territorial extent of their trade in it when the former bill was filed; (3) that this adjudication enured to R by privity and (4) barred the subsequent suit, notwithstanding the latter related to whiskey of another type—"straight" whiskey,—and notwithstanding the subsequent registration of the trademark by the plaintiff for "straight" whiskey under the federal act.

226 Fed. Rep. 531, reversed.

THIS is a bill in equity brought by the Gaines Company against the Rock Spring Company to restrain the latter from using the trademark of the former. The trademark is registered and is employed by the Gaines Company to designate a brand of straight rye or straight bourbon whiskey manufactured by that company.

The following are the facts of the bill, stated narratively: The Gaines Company is the owner of a whiskey distillery in Woodford County, Kentucky, known and named as the Old Crow Distillery. It is the only one in the State that is or ever has been designated by the name of "Crow" or "Old Crow."

Its product has been at all of the times mentioned in

the bill straight rye and straight bourbon whiskey and to it there has at all times been applied the trademark consisting of the words "Old Crow" by being imprinted or branded on the wooden box containing the whiskey and imprinted upon labels affixed to bottles containing the whiskey. The trademark is now and for many years past has been used by the company and its predecessors in commerce among the States.

On February 26, 1909, it filed in the Patent Office, in pursuance of the Act of February 20, 1905, 33 Stat. 724, in due form and under the conditions required, an application for registration of the trademark and a certificate of registration for the same was duly issued and for many years past has been used by the company as a trademark for its straight rye and straight bourbon whiskey.

The Gaines Company, availing itself of certain acts of Congress, began and has ever since maintained the bottling of the "Old Crow" in bond and it was then and has ever since remained the only "Old Crow" whiskey bottled in bond and has an extensive sale throughout the United States and in foreign countries; and when so bottled in bond it is known as and called "Old Crow Bottled in Bond," is so marked, and commands a high price.

The Rock Spring Company is a corporation, has a distillery in the county of Daviess, Kentucky, and is the owner of a distillery situated therein known as Distillery No. 18, operated by Silas Rosenfield, one of the defendants.

The Rock Spring Company, in fraud of the Gaines Company's rights and in infringement of its trademark, made or caused to be made and sold or caused to be sold in Kentucky a certain spurious straight bourbon whiskey, not the product of the Gaines Company, and branded the same with the words "Celebrated Old Crow

Whiskey Bottled in Bond," have caused the same to be bottled in bond, have applied to the labels thereon the words "Old Crow" in script type, and have caused the same to be sold and transported in interstate commerce, and this with the intent to mislead and deceive the public, and are doing so and will continue to do so unless restrained.

An injunction is prayed and an accounting.

Demurrers were filed by the Rock Spring Company and Rosenfield, which were overruled, and they then answered, pleading a prior adjudication based upon the following alleged facts: A suit was brought in the United States Circuit Court for the eastern division of the Eastern District of Missouri by W. A. Gaines & Company against Abraham M. Hellman and Moritz Hellman charging infringement of the trademark and unfair competition. The bill was subsequently amended making Max Kahn, administrator, with will annexed, of the estate of Abraham M. Hellman, deceased, a party to the suit. Upon the issues framed a decree was entered in favor of the complainants, an injunction granted and an accounting ordered.

The decree was reversed by the United States Circuit Court of Appeals for the Eighth Circuit with directions to dismiss the bill on the ground that the evidence clearly showed that the predecessors in business of the appellants therein had adopted the words "Old Crow" as a trademark for whiskey as early as the year 1863, and the evidence failed to show that the predecessors of the Gaines Company had used the words as a trademark prior to the year 1870.

A petition for certiorari to review the decision was denied by the Supreme Court of the United States.

Other proceedings were had in the suit pending its appeal and afterward. The suit, however, was finally dismissed on the merits because of the decision of the

Court of Appeals and the action of the Supreme Court of the United States.

Defendants are in privity with the parties recovering under those decisions and decrees and are manufacturing whiskey under contracts of agency from them or their successors and neither have nor claim any right except through such contract.

The Hellman Distilling Company filed a petition to be permitted to intervene, which was denied. 179 Fed. Rep. 544.

After hearing, a decree was entered sustaining the plea of former adjudication based on the decree of the Circuit Court for the Eastern District of Missouri, and accordingly and for that reason the bill of complaint, so far as it sought relief for any infringement of the trademark "Old Crow" in connection with its use on whiskey, was dismissed. And it was further decreed that the registration of the trademark July 20, 1909, could not and did not invalidate or nullify the estoppel. 202 Fed. Rep. 989.

The decree was reversed by the Circuit Court of Appeals (226 Fed. Rep. 531,) and thereupon this certiorari was applied for and allowed.

Mr. Luther Ely Smith, with whom *Mr. W. T. Ellis* was on the briefs, for petitioners.

Mr. Edmund F. Trabue and *Mr. James L. Hopkins*, with whom *Mr. Daniel W. Lindsey* was on the brief, for respondent.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The decree of the Circuit Court for the Eastern District of Missouri, directed by the decision of the United States Circuit Court of Appeals for the Eighth Circuit,

is pleaded in bar, and whether it is such depends upon the issues that were made or passed upon in those courts.

The bill of complaint in the case alleged that in 1835 one James Crow (he is the James Crow of this suit) invented and formulated a novel process for the production of whiskey which he did not patent or seek to patent but kept for his own use until his death in 1855.

During all of the time after 1835 the whiskey so produced was known and styled as "Old Crow" whiskey and the designation was adopted and used as a trademark.

After the death of Crow one William F. Mitchell, to whom Crow had communicated his secret process, continued the distillation so designated, and in 1867 a partnership, styled Gaines, Berry & Co., obtained possession of the distillery wherein the whiskey distilled by the indicated process continued to be produced by the same process until the partnership was succeeded by W. A. Gaines & Co., and the latter company succeeded also to all of the partnership assets of the other and continued to produce the whiskey until the incorporation of the complainant, when all these assets were acquired by it.

When the name "Old Crow" was applied by Crow, it was a valid trademark, and since its adoption it has always been applied to the whiskey produced by the indicated secret process, and since that time has indicated to the public whiskey distilled on Glenn's Creek, in Woodford County, Kentucky, and nowhere else.

Complainant caused the same to be registered in the Patent Office under the provisions of the act of Congress so providing. The value of the trademark is $500,000 and an integral part of the good will of complainant's business, and the whiskey is of greater value than any other of equal age.

Since January, 1903, the defendants, in violation of complainant's rights and good will, have made or caused to

to be made and sold in the City of St. Louis a certain spirituous or alcoholic fluid not made under complainant's process and have labeled it with the words "Old Crow" without license from the complainant and against its consent. Such unlawful use will greatly lessen the value of complainant's business and good will, and complainant is without adequate remedy at law.

There was the usual prayer for an accounting and an injunction.

There was a supplemental bill to the same effect, but charging that A. M. Hellman & Co. had become the successors of the original defendants and had continued the acts alleged in the original bill.

To the bill the defendants answered, with denials, and alleged the use of the words "Crow," "Old Crow" and "J. W. Crow" in connection with their own business upon packages of whiskey and in their and their predecessor's business from 1863 and prior thereto; that the whiskey sold by complainant was an unrefined, harmful and deleterious article and that the whiskey sold by them was a brand largely free from impurities.

The defendants also filed a cross bill which, however, was not insisted upon.

These, then, were the issues, and upon them and the evidence adduced to sustain them the Circuit Court entered a decree establishing complainant's right to the word "Old Crow" as a trademark, enjoined the use thereof by defendants and found them guilty of unfair competition in business and ordered an accounting. The Circuit Court of Appeals reversed the decree.

The latter court made a careful review of the evidence, denominating it a mass of the relevant and irrelevant, and felt that it was not necessary to consider the comparative excellence of the whiskeys, and remarked that the evidence did "not show that Glenn's Creek in any way entered into the composition of the whiskey" and that

"there was no secret about the process employed by Crow nor did it differ materially from that employed by every other distiller of the same period." To the objection that the "designative words" were rarely used by the Hellmans and that their product was of inferior quality, the court replied that the right to use could not be measured by the extent to which the Hellmans employed it, "whether more or less frequently," nor "by the overshadowing comparative amount of the complainant's [Gaines & Company's] sales under the designation of 'Old Crow' whiskey, nor by the asserted superiority of its product."

The court concluded as follows: "(1) That inasmuch as the defendants' predecessors in business, prior to the use or the adoption of the designative word 'Crow,' or the words 'Old Crow,' as a trademark, employed those words in descriptive terms in connection with their business as dealers in whiskey in St. Louis, Mo., and said predecessors and the defendants so continued to use the same, to a limited extent, up to the time of the institution of this suit, in good faith, they are not guilty of infringing the complainant's claimed trademark; and (2) that the defendants are not guilty of having engaged in unfair competition with the complainant in the prosecution of their business."

It will be observed that the issues in that case were the same as those in the present case as to the right to the use of the word "Crow" with any of its qualifications. But in this case there is another ground of recovery alleged, that is, the application for and the receipt of the certificate of registration for the word as a trademark for straight rye and straight bourbon whiskey. The District Court, however, adjudged that the decree of the Circuit Court in Missouri directed by the Circuit Court of Appeals constituted a bar to this suit To the judgment of the Circuit Court of Appeals of the

Sixth Circuit, reversing the action of the District Court, this certiorari is directed.

The Circuit Court of Appeals, however, did not yield to all of the views of the Gaines Company. It refused to decide, as urged to do, that the defendants in this suit were not in privity with the defendants in the other, and it rejected the contention that the use of the trademark established in the Hellman Company for a blended whiskey was not an adjudication of the right to use it upon a straight whiskey. In the rulings on both contentions we concur. The first needs no comment; we adopt that of the court on the second. The court said that "whatever the extended classifications and subclassifications of the Patent Office practice may contemplate, neither the common law nor the registration statute can intend such confusion as must result from recognizing the same trademark as belonging to different people for different kinds of the same article. Established trademarks directly indicate origin; but, if they have any value, it is because they indirectly indicate kind and quality, and to say that the seller of a blended whiskey might properly put upon it a mark which was known to stand for a straight whiskey, or vice versa, would be to say that he might deceive the public, not only as to the origin, but also as to the nature and quality, of the article."

The philosophy of this might be questioned. But it seems to have become established, and, however it may be disputed in reason, there is an opposing consideration. As said by Circuit Judge Sanborn in *Layton Pure Food Co.* v. *Church & Dwight Co.* (C. C. A.), 182 Fed. Rep. 35, 39, "Uniformity and certainty in rules of property are often more important and desirable than technical correctness."

And this reasoning prevailed with the Circuit Court of Appeals which, after citing cases, said that it was forced to think "that whatever was adjudicated regarding

plaintiff's title to its trademark applies to its use of both kinds of whiskey." And, of course, conversely we may say that, whatever was decided against its title to its trademark applies to its use on both kinds of whiskey. In other words, if defendants were adjudged to have title to the words "Crow" or "Old Crow" on blended whiskey, they have a right to use it on straight whiskey without infringing any right of complainant. We come back, therefore, to the question as to what was adjudged in the prior suit.

To this question the Court of Appeals of the Sixth Circuit gave great care and in an opinion of strength decided the negative of it. The court, in concession to the argument, assigned a prior use to the Hellmans, but expressed the view that the existence of such "general or *prima facie* exclusive right is not inconsistent with an inability to enforce it against some persons and under some circumstances." And it was added: "Instances may arise where the affirmative conduct or the laches of the first appropriator, and with reference to what he was at first entitled to call an infringement, has been such that on the principles of estoppel or the rule of laches a court of equity cannot tolerate that he should enforce against the later user the right which might have been originally perfect. . . . Under these considerations and upon reference to the pleadings and the proofs in the Hellman case, we conclude that the latter case is of the class where the refusal to give an injunction to the first appropriator of the mark may be justified upon the ground of his laches or estoppel; and so this ground of support must be considered in determining what is the true basis of that decree."

The court hence concluded that the decree did not adjudge title to the Hellmans but adjudged them a "defensive right and nothing more," and, explaining the right, the court said that it "does not extend to any whiskey

not mixed or blended so as to be of the same general type as that which defendants [Hellmans] had been making, or to trade or territory which they were not selling when that bill was filed."

We are not able to assent. The court admitted that the language in the body of the opinion of the Circuit Court of Appeals for the Eighth Circuit is consistent with the interpretation petitioners put upon it, that is, "that the trademark, in its general, *prima facie*, affirmative aspect, belonged to the Hellmans by prior appropriation," but the court added that the last paragraph of the opinion indicated "that the two judges (only two sitting) did not unite in putting the decision on this ground." We think this was an oversight. The opinion was that of the court, though delivered by one judge, and the conclusion was the conclusion of the court and necessarily had to be, else there would have been no decision or decree. And it was thoroughgoing. It is manifest from the excerpts we have made from the opinion that the judgment of the court was not limited as to time or territory; nor did the pleadings so limit it. The complainant in that case (respondent here) alleged that it was the sole and exclusive owner of the trademark and had used it from 1835 to the present time, being virtually the successor of the first producer of the product.

Defendants (petitioners) contested the claim and asserted a right in themselves based on prior adoption and continuous use, and that right was adjudged to them.

Decree of the Circuit Court of Appeals reversed and that of the District Court affirmed.

IRELAND *v.* WOODS, POLICE COMMISSIONER OF THE CITY OF NEW YORK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 611. Argued March 6, 1918.—Decided March 18, 1918.

The jurisdiction to review a state court judgment by writ of error under Jud. Code, § 237, as amended, is confined to cases in which the validity of a treaty or statute of, or authority exercised under, the United States was drawn in question, and the decision was against the validity; and those in which the validity of a statute of, or an authority exercised under, a State was drawn in question, on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision was in favor of the validity.

When, however, the state court's judgment upholds the federal treaty, statute or authority, against the claim of invalidity, or denies the validity of the state statute or authority upon an attack based on federal grounds, or when the basis of this court's jurisdiction is a claim of federal title, right, privilege or immunity, decided for or against the party claiming, review can be had only by certiorari.

The writ of error is allowed as of right, in the cases designated therefor by the statute, when the federal question presented is real and substantial, and an open one in this court; but certiorari is granted or refused by this court in the exercise of its discretion. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162.

The foregoing limitations apply in *habeas corpus* cases as in others sought to be reviewed under Jud. Code, § 237.

Where a person held for interstate rendition obtained *habeas corpus* upon the ground that he was not a fugitive from justice, basing the contention on a construction of the indictment as to the time of the offense charged and on his view of evidence offered by him touching the time of his presence in the demanding State and his opportunity to commit the offense, *held*, that the contention did not draw in question the validity of the authority exercised under the arresting State by its governor in issuing his warrant and in holding the petitioner for removal, but merely the correctness of the exercise, and that a judgment of the state court holding, on the indictment and

evidence, that petitioner was a fugitive, and dismissing the *habeas corpus*, could not be reviewed by writ of error under Jud. Code, § 237.

Writ of error to review 177 App. Div. 1; 221 N. Y. 600, dismissed.

THE case is stated in the opinion.

Mr. George W. Wickersham, with whom *Mr. Arthur C. Patterson* and *Mr. Henry Goldstein* were on the briefs, for plaintiff in error.

Mr. Robert S. Johnstone, with whom *Mr. Edward Swann*, *Mr. Robert D. Petty* and *Mr. Don Carlos Buell* were on the briefs, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

A case in interstate rendition. Upon requisition of the Governor of the State of New Jersey, representing that Ireland, plaintiff in error, was charged in that State with the crime of conspiracy and with having fled therefrom and taken refuge in New York, the Governor of the State of New York issued his warrant requiring Ireland to be arrested and delivered to the agent of the State of New Jersey to be taken back to the latter State. By virtue of the warrant defendant in error, Woods, police commissioner of the City of New York, arrested Ireland.

After his arrest Ireland filed a petition in *habeas corpus* in the Supreme Court of New York County, State of New York, for his discharge from the custody of Woods, alleging that the arrest was illegal and that he was restrained of his liberty in violation of the provisions of subdivision 2 of § 2, Art. IV, of the Constitution of the United States, and of § 5278 of the Revised Statutes of the United States. The basis of the charge was that he

was not within the limits of the State of New Jersey at the times the alleged crimes were said to have been committed, nor was there any evidence, either before the Governor of New Jersey when that officer issued his demand upon the Governor of New York or before the latter when he issued his warrant, that he (Ireland) was within the limits of New Jersey at such times; and therefore it did not appear that he was a fugitive from the justice of New Jersey. And it was charged that it appeared on the face of the indictment that no crime under the laws of New Jersey was alleged or was committed.

Woods duly made return to the petition, to which were annexed the requisition of the Governor of New Jersey and the warrant of the Governor of New York.

Ireland traversed the return under oath, and denied that he had committed the crimes charged against him, or any crime; denied that he was within the State at the times that the indictment charged the crimes were committed, which he alleged to be the 1st of January, 9th of June and 12th of July, 1913, or that he was in the State at the time of the finding of the indictment; alleged that he examined a sworn copy of the requisition of the Governor of New Jersey and that it did not contain any evidence or proof that he, Ireland, was in that State on any day in any of the months set forth in the indictment; and he further denied that he was a fugitive from the justice of the State.

After a hearing, at which the papers which were before the Governor of New York at the time he issued his warrant were introduced in evidence (over the objection of Ireland), and certain oral testimony, including that of Ireland, an order was entered dismissing the writ. It was successively affirmed by the Appellate Division and the Court of Appeals. This writ of error was then sued out.

It is stated in the opinion of the Appellate Division, Judge Shearn speaking for the court, that the requisition

was honored upon the production of the necessary papers and that it was not claimed there was no sufficient showing before the Governor to warrant the exercise of his jurisdiction; the case depending entirely on the testimony that he, Ireland, was only three times in New Jersey, none of which times was charged in the indictment.

The court did not pass upon or even refer to the charge of the petition that his arrest was in violation of the Constitution of the United States or of § 5278, Rev. Stats. It rested its decision upon the 6th count of the indictment and the testimony of Ireland.

The 6th count charged that the offenses were committed "on or about the first day" of January, 1913, "and on divers other days between that day and the day of the taking of the Inquisition." And the court rejected the contention made by counsel that this was merely an allegation of a crime committed on January 1st and held that the dates set forth in the count defined a period of time during any part of which the offenses could have been committed, citing *Commonwealth* v. *Wood*, 4 Gray, 11; *Commonwealth* v. *Snow*, 14 Gray, 20; and held further that the indictment followed the common and accepted form of pleading a continuing conspiracy, adducing *Commonwealth* v. *Sheehan*, 143 Massachusetts, 468; *Commonwealth* v. *Briggs*, 11 Metc. 573; *Commonwealth* v. *Dunn*, 111 Massachusetts, 426.

Considering the effect of Ireland's concession that he was present in the State on at least three occasions during the period defined, the court held, upon the authority of certain cases, that there could be no question but that he was a fugitive from justice within the meaning of the extradition law for his presence there was not under conditions which established the impossibility of his participation in the conspiracy; that, although his stay was short on each occasion, there was an abundance of opportunity not only to confer with his alleged confed-

erates but to hand to them the letters of credit and bogus checks which, it was alleged, were used to accomplish the overt acts.

It was not considered necessary to pass upon the contentions with respect to the five other counts of the indictment.

A motion to dismiss is made, the grounds of it being: (1) The judgment of the Court of Appeals is reviewable, if at all, only by certiorari. (2) It is not reviewable at all because under the limitation of the jurisdiction of the Court of Appeals it had no power to review or decide the question whether there was any evidence to show that Ireland was a fugitive from justice and that the Court of Appeals must be assumed not to have passed upon or to have decided the question whether Ireland was a fugitive from justice. Whether the assumption is justified or not we do not consider, on account of the view we entertain of the first ground of the motion, to which we immediately pass. To sustain it counsel adduces § 237 of the Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726. It provides in what cases and how there can be a review of a judgment or decree of a state court by this court. It reads as follows: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error."

When, however, the conditions are reverse, that is, when state court judgments affirm the national powers

against a contention of their invalidity or do not sustain the validity of the state authority against an attack based on federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up.

The difference between the remedies is that one (writ of error) is allowed as of right where upon examination it appears that the case is of the class designated in the statute and that the federal question presented is real and substantial and an open one in this court, while the other (certiorari) is granted or refused in the exercise of the court's discretion.[1]

Coming, then, to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question nor, in the meaning of the section, the validity of a statute or authority of the State. There is no doubt of the right of the Governor of New Jersey to have demanded of the Governor of New York the extradition of Ireland, nor of the Governor of the latter State to have complied. Indeed, it was the duty of both so to act if the case justified it, and whether there was such justification was the only inquiry and decision of the courts below.

We said in *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its

[1] *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Spies* v. *Illinois*, 123 U. S. 131; *In re Kemmler*, 136 U. S. 436; *Philadelphia & Reading C. & I. Co.* v. *Gilbert*, 245 U. S. 165.

validity. See also *Foreman* v. *Meyer*, *Id.* 452. If there be no dispute about the facts, *Hyatt* v. *Corkran*, 188 U. S. 691, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a State.

In opposition to the motion to dismiss, plaintiff in error contends that a writ of error is the proper proceeding to bring to this court for review the final order or judgment of a state court in a *habeas corpus* proceeding. Undoubtedly, if the proper conditions of review by that writ exist as prescribed in the amended § 237 of the Judicial Code, *supra*. The argument of counsel to show that such conditions do exist in the instant case is somewhat roundabout. It begins by the assertion that the warrant under which Ireland was held in custody was an exercise of the authority of the State in that it was issued by the Governor pursuant to the provisions of § 827 of the Code of Criminal Procedure of that State. It is not necessary to quote it. It is simply the fulfillment by the State of New York of the Constitution of the United States and, it may be said, of § 5278, Rev. Stats. It enjoins the duty upon the Governor, when a requisition is made upon him by the Governor of another State, to issue his warrant for the arrest "of a fugitive from justice." It is upon the quoted words (which, we may say in passing, are a paraphrase of the provision of the Constitution of the United States and of § 5278, Rev. Stats.) that the argument of counsel dwells and terminates, the persistent contention being that Ireland is not such a fugitive and that the decision of the Supreme Court at Special Term and in the Appellate Division to the contrary was based on the construction of the New Jersey indictment—a pure question of law, it is contended, and that the effect the court gave to Ireland's presence in the State at the testified times is another question of law. "These questions

were reviewable in the Court of Appeals and are open to decision in this court," is the final insistence of counsel.

We are unable to assent to the latter part of the insistence. Questions of law which may be raised upon the indictment, the deductions from the facts which may be charged against the action of the Governor, do not impugn it or the validity of the statute which enjoined it. And surely the decisions of the courts of New York, one trial and two appellate, affirming the legality of his action, are not decisions against the validity of the authority he exercised.

There is a difference between a question of power to pass a law and its construction, and a difference between the endowing of an officer with authority and his erroneous exercise of that authority. As was said by Chief Justice Fuller, speaking for the court in *United States* v. *Lynch*, 137 U. S. 280, 285: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed."

We think, therefore, that the writ of error must be, and it is,

Dismissed.

UNION PACIFIC RAILROAD COMPANY *v.* HADLEY, ADMINISTRATOR OF CRADIT.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 174. Argued March 7, 1918.—Decided March 18, 1918.

If the defendant's conduct, viewed as a whole, warrants a finding of negligence, the trial court may properly refuse to charge concerning each constituent item mentioned by the declaration, and leave the general question to the jury.

The fact that a brakeman, who was killed by a rear-end collision while in the caboose of a standing train, would have escaped if he had been at his post to give warning, as his duty required, does not make his neglect the only proximate cause of his death, if the collision was due also to negligent operation of the train coming from behind. The case is within the terms of Employers' Liability Act, § 1.

In an action under the Employers' Liability Act, where the evidence is such as to justify the jury in treating the employee's contributory negligence as slight, or inconsequential in its effects, the jury may properly find that nothing substantial should be deducted on account of it from the damages; and the fact that the verdict is excessive will not warrant an assumption that, in making such finding, the jury disobeyed the court's instructions on apportionment.

Where the state trial and supreme courts cut down an excessive verdict upon the assumption that the excess was due to the jury's failure to follow instructions on diminution of damages for contributory negligence, *held*, the assumption not being justified by the record, that their action did not invade the province of the jury under the Federal Employers' Liability Act, but was merely in exercise of their power to require a remittitur.

99 Nebraska, 349, affirmed.

THE case is stated in the opinion.

Mr. N. H. Loomis, with whom *Mr. A. G. Ellick* was on the briefs, for plaintiff in error.

Mr. John J. Halligan, with whom *Mr. Wesley T. Wilcox*, *Mr. C. Petrus Peterson*, *Mr. Robert W. Devoe* and *Mr. Joseph M. Swenson* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, for causing the death of Cradit, the plaintiff's (the defendant in error's) intestate. The case was brought to this Court before the Act of September 6, 1916, c. 448, 39 Stat. 726,

and with the exception of one or two matters that need a word, presents only the ordinary questions of negligence that it is not our practice to discuss at length.

The deceased was a brakeman on an eastbound freight train known as Extra 504 East. At Dix, in Nebraska, it was overtaken by another eastbound train known as Extra 501 East. There is a single track from Dix to Mile Post 426, 17 miles distant, and train 504 went ahead to this latter point. Train 501 followed for about half the distance to Potter and was held there until 504 had reached Mile Post 426, seven miles further on, when 501 was started on again, leaving its conductor there. But an Extra 510 West had broken down at Mile Post 426 and the train dispatcher at Sidney, about twelve miles still further east, ordered train 504 to take the disabled engine of 510 back to Sidney. The engineer asked the dispatcher to allow 504 to go on and to let 501, when it came up, take back the engine of 510, but it was refused. No. 501 came up, ran into 504 and killed Cradit and some others. The plaintiff says that the accident was due to at least contributory negligence of the railroad—the defendant that it was not negligent, that Cradit would not have been killed if he had done his duty and had gone back to warn the following train by lights, torpedoes, &c., instead of remaining in the caboose, as he did, and that this was the proximate cause of his death.

On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question. We are not

left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point.

But it is said that in any view of the defendant's conduct the only proximate cause of Cradit's death was his own neglect of duty. But if the railroad company was negligent it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practical unit rather than enquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not "result in part from the negligence of any of the employees" of the road. Act of April 22, 1908, c. 149, § 1, 35 Stat. 65. In *Great Northern Ry. Co.* v. *Wiles*, 240 U. S. 444, it appeared that the only negligence connected with the death was that of the brakeman who was killed.

The Court after instructing the jury that Cradit assumed the ordinary risks of his employment, but not extraordinary ones, in a form that is not open to criticism here, instructed them further that he was guilty of con-

tributory negligence, and that, under the statute, if the jury found it necessary to consider that defence, his negligence was to go by way of diminution of damages in proportions explained. The jury in answer to a question found that nothing should be deducted for the negligence of the deceased, and found a verdict for $25,000, which was cut down to $15,000 by the trial Court, and to $13,500 by the Supreme Court. There were intimations that the jury disregarded the instructions of the Court and on that footing the defendant claims the right to a new trial in order that the jury may determine the proper amount to be deducted, since that was a matter that the Court had no right to decide. But however the belief that the jury had disregarded the instructions may have influenced the mind of the Court, we perceive no legal warrant for the assumption. The account of the weather and other circumstances on the plaintiff's side made it possible for the jury to believe that Cradit's duty was so nearly impossible of performance that no substantial allowance should be made on that account. It does not appear that his superior, the conductor, who was in the caboose with him, required him to perform the task. And since the finding was possible on the evidence it cannot be attributed to disregard of duty. The Court had the right to require a remittitur if it thought, as naturally it did, that the verdict was too high. Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong.

Judgment affirmed.

WELLS v. ROPER, FIRST ASSISTANT POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 103. Argued January 2, 1918.—Decided March 18, 1918.

The First Assistant Postmaster General, in accordance with a decision of the Postmaster General, undertook to terminate an existing contract for automobile mail service at Washington, D. C., to make place for a similar service to be conducted by the Department under a special appropriation, his action being based upon the supposed authority of the contract itself and being purely official, discretionary, and within the scope of his duties. *Held*, that a suit to restrain him from annulling the contract and from interfering with its further performance was in effect a suit against the United States, and was therefore properly dismissed.

44 App. D. C. 276, affirmed.

THE case is stated in the opinion.

Mr. Daniel Thew Wright, with whom *Mr. T. Morris Wampler* was on the briefs, for appellant.

Mr. Assistant to the Attorney General Todd for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity brought in the Supreme Court of the District of Columbia for an injunction to restrain Daniel C. Roper, First Assistant Postmaster General, from annulling a contract theretofore made between plaintiff and the Postmaster General acting for the United States, and from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff. The Supreme Court sustained a

motion to dismiss the bill, its decree to that effect was affirmed by the Court of Appeals of the District of Columbia (44 App. D. C. 276), and plaintiff appeals to this court.

The contract was made February 14, 1913, and by it plaintiff agreed for a stated compensation to furnish, during a period of four years, a number of automobiles (with chauffeurs) specially equipped according to specifications, for use in collecting and delivering mail at Washington, D. C. One of its provisions (the third) was a stipulation that "any or all of the equipments contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part"— meaning the Postmaster General.

Another was: "18. That all acts done by the First Assistant Postmaster General in respect of this contract shall be deemed and taken, for all purposes, to be the acts of the Postmaster General, within the meaning and intent of this contract."

Plaintiff expended considerable sums of money and incurred substantial obligations in providing automobiles and other special equipment necessary for the performance of the contract, and continued to perform it for nearly two years. Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, c. 33, 38 Stat. 295, 300, by which he was authorized in his discretion to use such portion of a certain appropriation as might be necessary "for the purchase and maintenance of wagons or automobiles for and the operation of an experimental combined screen wagon and city collection and delivery service," determined it to be in the interest of the public service that such an experiment should be conducted at Washington, D. C., and in order to do this deemed it necessary to discontinue the service then being performed by plaintiff. Accordingly the First Assistant Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his

contract should be canceled, and that "under the third stipulation of the contract the use of all of the automobiles furnished thereunder will be discontinued at the close of business January 31, 1915, and the contract canceled effective on that date." Notwithstanding protest by plaintiff, this decision was adhered to, and the present suit was commenced.

Both courts held it to be essentially and substantially a suit against the United States and therefore beyond the jurisdiction of the court, and in this view we concur. The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—a direct interference with one of the processes of government. The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do.

That the interests of the Government are so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party, although not named in the bill, is entirely plain. And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent

with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States. See *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171, and cases cited; *Belknap* v. *Schild*, 161 U. S. 10, 17, 18; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. Hence, without considering other questions discussed by the courts below or raised by appellant in this court, we conclude that the dismissal of the bill was not erroneous.

Decree affirm

SHECKELS, SURVIVING EXECUTRIX OF SHECKELS, *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

No. 144. Argued January 28, 1918.—Decided March 18, 1918.

Under the Act of June 16, 1880, c. 243, 21 Stat. 284, as amended March 3, 1881, c. 134, 21 Stat. 566, conferring jurisdiction on the Court of Claims over certain claims against the District of Columbia,

a claimant is not entitled to receive interest as such, save any that may accrue after rendition of the judgment, where the recovery is not based upon a contract expressly stipulating for interest. Rev. Stats., § 1091.

The provision of § 6 of the Act of 1880, *supra*, for satisfying such judgments with bonds bearing coupons for interest from the date upon which the claims were due and payable, amounted to giving interest, at a limited rate, before and after judgment, where payment was made in that mode; but where the amount of such bonds remaining unissued, of the maximum authorized by that section, was less than the amount of the claim allowed, the Court of Claims properly adjudged that, with respect to any part of the claim not paid in that special manner, there was no right to interest prior to the rendition of the judgment.

Affirmed.

THE case is stated in the opinion.

Mr. John Raum, with whom *Mr. V. B. Edwards* was on the briefs, for appellant.

Mr. Assistant Attorney General Thompson for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal by claimant in a suit that was commenced by her testator in the Court of Claims in the year 1880, under Act of June 16, 1880, c. 243, 21 Stat. 284. A judgment was rendered in claimant's favor after the amendatory Act of February 13, 1895, c. 87, 28 Stat. 664 (*Johnson* v. *District of Columbia*, 31 Ct. Clms. 395), which judgment was reversed by this court in 1897, and the cause remanded for further proceedings (*District of Columbia* v. *Johnson*, 165 U. S. 330). After a long delay, proceedings were had which resulted in a judgment in favor of claimant February 21, 1916, from which the District of Columbia has not appealed.

Claimant's appeal relates to the question of interest

upon the amount recovered. The form of the judgment is that the claimant "do have and recover of and from the District of Columbia in the manner provided by the Act of June 16, 1880, Chapter 243, Seven thousand three hundred and six dollars and twenty-five cents ($7,306.25). Said amounts were due and payable April 1, 1876, but said judgment shall bear interest only from the date of its rendition, and is payable as provided by section 6 of the Act of June 16, 1880 (21 Stat. L., p. 284), as amended by the Act of March 3, 1881 (21 Stat. L., p. 466)." There is no finding that the claim is based upon a contract expressly stipulating for the payment of interest.

It is insisted that the court erred in allowing interest only from the date of judgment, rather than from April 1, 1876, the day on which the claim became due and payable.

The Act of 1880, in its first section, conferred jurisdiction upon the Court of Claims over all claims then existing against the District of Columbia arising out of certain operations of the District government during the preceding decade; and as to procedure it declared: "Said Court of Claims shall have the same power, proceed in the same manner, and be governed by the same rules, in respect to the mode of hearing, adjudication, and determination of said claims, as it now has in relation to the adjudication of claims against the United States." This, if it stood alone, would leave the question of interest to be governed by the general principle that interest is not recoverable from the government, embodied in § 1091, Rev. Stats.: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," still in force as § 177, Judicial Code, 36 Stat. 1141, c. 231.

But other sections of the Act of 1880 contain provisions that must be considered. By § 5 it was enacted that, where no appeal was taken, or on affirmance of a judgment

in favor of the claimant, "the sum due thereby shall be paid, as hereinafter provided, by the Secretary of the Treasury," upon presentation to him of a copy of the judgment properly certified. And by § 6 the Secretary was authorized to demand of the sinking fund commissioner of the District of Columbia so many of the 3.65 per cent. bonds authorized by Act of Congress approved June 20, 1874, c. 337, 18 Stat. 120, and amendatory acts, as might be necessary for the payment of the judgments; "which bonds shall be received by said claimants at par in payment of such judgments, and shall bear date August first, eighteen hundred and seventy-four, and mature at the same time as other bonds of this issue; *Provided*, That before the delivery of such bonds as are issued in payment of judgments rendered as aforesaid on the claims aforesaid, the coupons shall be detached therefrom from the date of said bonds to the day upon which such claims were due and payable; and the gross amount of such bonds heretofore and hereafter issued shall not exceed in the aggregate fifteen millions of dollars." By amendment of March 3, 1881, c. 134, 21 Stat. 458, 566, the Treasurer of the United States as *ex officio* sinking fund commissioner was authorized, whenever in his opinion it would be more advantageous for the interest of the District of Columbia to do so, to sell the bonds and pay the judgments from the proceeds of the sales instead of delivering the bonds to the claimants.

Under the Act of 1880, the Court of Claims held that it was necessary it should determine when the claims were due and payable within the meaning of the act, and specify the date in the judgment, in order that the Secretary of the Treasury might know what coupons, if any, were to be detached from bonds delivered by him in payment. *Fendall's Case*, 16 Ct. Clms. 106, 121. See *District of Columbia* v. *Johnson*, 165 U. S. 330, 336.

Construing §§ 1, 5, and 6 of the Act of 1880 in connec-

tion with § 1091, Rev. Stats., it is plain that the claimant in such a judgment is not entitled to a recovery of interest as such, saving any that may accrue after the rendition of the judgment, unless the recovery be based upon a contract expressly stipulating for the payment of interest. Section 6, however, provided a special fund out of which claims of this character might be paid, and as this consisted of coupon bonds dated in 1874 and maturing 50 years later, the provision to the effect that coupons maturing after the date upon which the claim was due and payable should accompany the bonds amounted to giving interest at a limited rate, before and after judgment, where payment was made in that mode.

But this special mode of payment was qualified by a proviso that the gross amount of such bonds should not exceed $15,000,000; and, as it happens, all except $2,700 had been issued prior to the entry of the judgment now under review. This is admitted in appellant's brief, and may be additionally verified by reference to Annual Report of the Secretary of the Treasury on the State of the Finances for the fiscal year ended June 30, 1915, p. 122; like report for the following fiscal year, p. 92.

It was not erroneous for the Court of Claims to take note of the fact that, at the utmost, only a part of the claim could be paid in bonds or from the proceeds of bonds, and that with respect to any part not paid in this special manner there was no right to interest prior to the rendition of the judgment. This is the effect of the judgment as entered.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

OMAECHEVARRIA *v.* STATE OF IDAHO.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 102. Argued December 20, 1917.—Decided March 18, 1918.

A law of Idaho (Rev. Codes, 1908, § 6872), applicable to the public domain, provides that any person having charge of sheep who allows them to graze on any range previously occupied by cattle, is guilty of a misdemeanor, and that priority of possessory right between cattle and sheep owners to any range is to be determined by the priority in the usual and customary use of it, as a cattle or sheep range. Experience, inducing this and similar laws, had, says the Supreme Court of the State, shown that use of a range by sheep unfits it for cattle, but not *vice versa*, and that segregation is essential to protect the cattle industry and prevent serious breaches of the peace between cattlemen and sheepmen.

Held: (1) That the police power of the State extends over the federal public domain, at least where there is no legislation by Congress on the subject.

(2) That in segregating sheep from cattle the Idaho law was primarily designed to preserve the peace, and is not an unreasonable or arbitrary exercise of the police power.

(3) That it does not discriminate arbitrarily and deny equal protection in giving preference to cattle owners in prior occupancy without giving a like preference to sheep owners in prior occupancy.

(4) That, as a criminal law, it is not wanting in due process, in failing to provide for the ascertainment of the boundaries of a "range" and for determining what length of time is necessary to constitute a prior occupation a "usual" one within its meaning.

(5) That it is not in conflict with the clause in § 1 of the "act to prevent unlawful occupancy of the public lands," c. 149, 23 Stat. 321, which prohibits the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim or color of title made or acquired in good faith, etc., since that clause, as is shown by an examination of the entire act and its history, prohibits merely the assertion of an exclusive right to use or occupation by force, intimidation, or by what would be equivalent in effect to an enclosure, whereas the state statute makes no grant, and, in so far as this exclusion of sheep from certain ranges approaches a grant

the result is incidental only, and it operates in favor of horse owners as well as cattle owners.

(6) That the exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States, Congress not having conferred on citizens the right to graze stock on the public lands, their use for that purpose being merely by sufferance.

27 Idaho, 797, affirmed.

THE case is stated in the opinion.

Mr. Frank P. Prichard and *Mr. Shad L. Hodgin* for plaintiff in error.

Mr. T. A. Walters, Attorney General of the State of Idaho, and *Mr. William Healy* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the Government's acquiescence, without the payment of compensation, and without federal regulation. *Buford* v. *Houtz*, 133 U. S. 320, 326. Experience has demonstrated, says the state court, that in arid and semi-arid regions cattle will not graze, nor can they thrive, on ranges where sheep are allowed to graze extensively; that the encroachment of sheep upon ranges previously occupied by cattle results in driving out the cattle and destroying or greatly impairing the industry; and that this conflict of interests led to frequent and serious breaches of the peace and the loss of many lives.[1] Efficient policing of the ranges is

[1] *Sweet* v. *Ballentyne*, 8 Idaho, 431, 447; *Pyramid Land & Stock Co.* v. *Pierce*, 30 Nevada, 237, 253-255. Report of National Conservation Commission, 1909, vol. III (60th Cong., 2nd sess., Senate Doc. No. 676), p. 357. Conference of Governors (1908), p. 143.

impossible; for the State is sparsely settled and the public domain is extensive, comprising still more than one-fourth of the land surface.[1] To avert clashes between sheep herdsmen and the farmers who customarily allowed their few cattle to graze on the public domain near their dwellings, the territorial legislature passed in 1875 the so-called "Two Mile Limit Law." It was enacted first as a local statute applicable to three counties, but was extended in 1879 and again in 1883 to additional counties, and was made a general law in 1887.[2] After the admission of Idaho to the Union, the statute was re-enacted and its validity sustained by this court in *Bacon* v. *Walker*, 204 U. S. 311. To avert clashes between the sheep herdsmen and the cattle rangers, further legislation was found necessary; and in 1883 the law (now § 6872 of the Revised Codes,) was enacted which prohibits any person having charge of sheep from allowing them to graze on a range previously occupied by cattle.[3] For

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[1] The land area of Idaho is approximately 53,346,560 acres [U. S. Census (1910), vol. VI, p. 401], of which 20,000,000 acres were specifically classified as grazing lands. Report of Secretary of Interior (1890), vol. I, p. XCI. In 1883 about 50,000,000 acres still formed a part of the public domain. "The Public Domain," by Thomas Donaldson (1884), pp. 528, 529, 1190. On July 1, 1914, there were still unappropriated and unreserved 16,342,781 acres. Report of Department of Interior (1914), vol. I, p. 207. The population of Idaho in 1880 was 32,610; in 1910 it was 325,594.

[2] Acts of January 14, 1875; February 13, 1879; January 31, 1883; Revised Statutes, 1887, § 1210 *et seq.* The first session of the territorial legislature convened December 7, 1863. Idaho was admitted to the Union July 3, 1890.

[3] Revised Codes of Idaho, 1908, § 6872:

"Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to

violating this statute the plaintiff in error, a sheep herdsman, was convicted in the local police court and sentenced to pay a fine. The judgment was affirmed by an intermediate appellate court and also by the Supreme Court of Idaho. 27 Idaho, 797. On writ of error from this court the validity of the statute is assailed on the ground that the statute is inconsistent both with the Fourteenth Amendment and with the Act of Congress of February 25, 1885, c. 149, 23 Stat. 321, entitled, "An act to prevent unlawful occupancy of the public lands."

First: It is urged that the statute denies rights guaranteed by the Fourteenth Amendment, namely: Privileges of citizens of the United States, in so far as it prohibits the use of the public lands by sheep owners; and equal protection of the laws, in that it gives to cattle owners a preference over sheep owners. These contentions are, in substance, the same as those made in respect to the "Two Mile Limit Law," in *Bacon* v. *Walker, supra;* and the answer made there is applicable here. The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject.[1] We cannot say that the measure adopted

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any range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

[1] The advisability of regulation by some system of leasing or licensing has been repeatedly recommended to Congress, and bills to that end have been introduced, but none has been enacted. Report of Department of Interior (1902), vol. I, pp. 167–175. Cong. Rec. vol. 35 (1901–1902), pp. 291, 1048. Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. XX–XXIII, 5–61. Cong. Rec., vol. 40 (1905–1906), pp. 54, 1164. Letter from the Acting Secretary of Interior, House Doc. No. 661 (March, 1906). Report of Department of Interior (1907), vol. I, pp. 78–81. Cong. Rec., vol. 42 (1907–1908), p. 14. Report of Department of Interior (1908), vol. I, p. 15. Action of the American National Live Stock Association relative to the Disposition of the Unappropriated Public Lands of the United States (1908). Report of Department of Interior (1911),

by the State is unreasonable or arbitrary. It was found that conflicts between cattle rangers and sheep herders on the public domain could be reconciled only by segregation. In national forests, where the use of land is regulated by the Federal Government, the plan of segregation is widely adopted.[1] And it is not an arbitrary discrimination to give preference to cattle owners in prior occupancy without providing for a like preference to sheep owners in prior occupancy.[2] For experience shows that sheep do not require protection against encroachment by cattle, and that cattle rangers are not likely to encroach upon ranges previously occupied by sheep herders. The propriety of treating sheep differ-

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vol. I, p. 9. Cong. Rec., vol. 48 (1911–1912), p. 69. Hearings before the House Committee on Public Lands on H. R. Bill 19857 (1912). Report of Department of Interior (1912), vol. I, p. 5. Cong. Rec., vol. 50 (1913), p. 2365; vol. 51 (1913–1914), pp. 939, 3814. Report of Department of Agriculture (1914), pp. 8–10. Hearing before a subcommittee of the House Committee on Public Lands on H. R. 9582, February 12, 1914, pp. 7–8. "Practical Application of the Kent Grazing Bill to Western & Southwestern Grazing Ranges," address by J. J. Thornber before the American National Live Stock Association, Denver, Colo., January 22, 1914. Report of Department of Agriculture (1915), p. 47. Cong. Rec., vol. 53 (1915–1916), p. 21. Report of Department of Agriculture (1916), pp. 18–19.

[1] National Forest Manual (1913), pp. 13, 28. Hearing before House Committee on H. R. 9582 and H. R. 10539, on Grazing on Public Lands (1914), p. 73. Grazing in Forest Reserves, by F. Roth, Yearbook of Department of Agriculture (1901), pp. 333, 338, 343. Grazing of Live Stock on Forest Reserves, by Gifford Pinchot, Report National Live Stock Association (1902), pp. 274, 275.

[2] In the prolonged discussion of the proposal to correct the abuses of "open range" by leasing government grazing lands, the propriety of safeguarding "rights" as determined by priority of occupancy and use has been generally insisted upon. See Conference of Governors (1908), p. 347; Report of Department of Interior (1902), p. 174; Report of Public Lands Commission, Senate Doc. (1905), 58th Cong., 3rd sess., No. 189, pp. 14, 60 (par. 13); National Forest Manual, June 4, 1913, pp. 53, 58.

ently than cattle has been generally recognized.[1] That the interest of the sheep owners of Idaho received due consideration is indicated by the fact that in 1902 they opposed the abolition by the Government of the free ranges.[2]

Second: It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the act. Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States.[3] This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434. Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

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[1] Reports of the Department of Interior (1898), vol. I, p. 87; (1899), vol. I, pp. XX, 105–112; (1900), vol. I, p. 390; (1901), vol. I, p. 127. Utah (1853), Laws 1851–1870, c. 60, p. 90; Washington, Laws 1907, p. 78; Arizona, Penal Code, 1913, § 641. See statutes cited, *infra*, in note 1, p. 352.

[2] Hearings before House Committee on Public Lands on Leasing Grazing Lands (1902), 57th Cong., 1st Sess., pp. 76–77.

[3] Montana, "Laws" 1871–1872, p. 287, § 87, makes it a crime to drive stock from a "range" on which they "usually" run. North Dakota, "Laws," 1891, p. 123, deals with "customary range"; Arizona, Penal Code, 1913, § 637, with "range"; Colorado, Courtright's Statutes, § 6375, with "usual range"; Texas, Penal Code Annotated, 1916, Art. 1356 (1866), with "accustomed range."

Third: It is further contended that the statute is in direct conflict with the Act of Congress of February 25, 1885.[1] That statute which was designed to prevent the

[1] "An act to prevent unlawful occupancy of the public lands.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

"Sec. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but on so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or em-

illegal fencing of public lands, contains at the close of § 1 the following clause with which the Idaho statute is said to conflict: "and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United

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ployee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

"Sec. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided,* This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

"Sec. 4. That any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. [As amended by Act of March 10, 1908, c. 75, 35 Stat. 40.]

"Sec. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

"Sec. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

"Sec. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

"Approved, February 25th, 1885."

States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

An examination of the federal act in its entirety makes it clear that what the clause quoted from § 1 sought to prohibit was merely the assertion of an exclusive right to use or occupation by force or intimidation or by what would be equivalent in effect to an enclosure. That this was the intent of Congress is confirmed by the history of the act. The reports of the Secretary of the Interior upon whose recommendation the act was introduced, the reports of the committees of Congress, and the debates thereon indicate that this alone was the evil sought to be remedied,[1] and to such action only does its prohibition appear to have been applied in practice.[2] Although Idaho had, by statute, excluded sheep from portions of the public domain since 1875—no reference to the fact has been found in the discussion which preceded and followed the enactment of the federal law, nor does any reference seem to have been made to the legislation of other States which likewise excluded sheep, under certain circumstances, from parts of the public do-

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[1] Reports of Department of Interior (1882), vol. I, p. 13; (1883), vol. I, pp. XXXII, 30, 210; (1884), vol. I, pp. XVII, 17; (1885), vol. I, p. 205. Letter of Secretary of Interior (1884), Senate Ex. Doc. (1883–1884), No. 127. Report of House Committee, 48th Cong., 1st sess. (1884), No. 1325; Report of Senate Committee, 48th Cong., 2nd sess. (1885), No. 979. Cong. Rec., vol. 15 (1883–1884), pp. 4768–4783; vol. 16 (1884–1883), p. 1457.

[2] *United States* v. *Brandestein*, 32 Fed. Rep. 738, 741; Reports of Department of Interior (1885), vol. I, p. 44; (1886), vol. I, pp. 30–41; (1887), vol. I, pp. 12–13; (1888), vol. I, p. XVI; (1901), vol. I, p. 92; (1902), vol. I, pp. 11, 172–173, 306; (1903), vol. I, pp. 18–19; (1904), vol. I, pp. 20, 367; (1905), vol. I, p. 20; (1908), vol. I, p. 15; (1915), vol. I, p. 226.

Compiled Statutes, §§ 4997–5002, notes.

main.[1] And no case has been found in which it was even urged that these state statutes were in conflict with this act of Congress.

The Idaho statute makes no attempt to grant a right to use public lands. *McGinnis* v. *Friedman*, 2 Idaho, 393. The State, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the forcible entry and detainer act of Washington, which was held in *Denee* v. *Ankeny*, *ante*, 208, not to conflict with the homestead laws, the Idaho statute was enacted primarily to prevent breaches of the peace. The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, "the exclusive use and occupancy of any part of the public lands." For every range from which sheep are excluded remains open not only to *all* cattle, but also to horses, of which there are many in Idaho.[2] This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used. *Buford* v. *Houtz*, *supra*. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. *United States* v. *Grimaud*, 220 U. S. 506; *Light* v. *United States*, 220 U. S. 523.

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[1] Statutes resembling the Idaho "Two Mile Limit Law" have been passed in a number of the western States. Arizona, Act of February 12, 1875, Compiled Laws, 1864–1877, p. 561; Penal Code of Arizona, 1913, § 639; Colorado, Courtright's Statutes, § 6377 (1877); Nevada, Revised Laws, 1912, § 2317 (1901), § 2319 (1907); California, Statutes, 1869–1870, p. 304.

[2] Compare U. S. Census (1910), vol. VI, p. 390; Report, Department of Agriculture (1914), p. 148.

343. Syllabus.

All the objections urged against the validity of the statute are unsound. The judgment of the Supreme Court of Idaho is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE MCREYNOLDS dissent.

PENDLETON *v.* BENNER LINE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 178. Argued March 11, 12, 1918.—Decided March 25, 1918.

Liability over is the reason for a bailee's right to recover the full value of the goods,—a reason which, whatever its inadequacy in history or theory as applied to torts, applies with real force to contract relations like those in this case.

A transportation company, holding itself out as a common carrier by sea, received consignments of goods, fixed and collected the freight, loaded the goods on a vessel which it chartered for their carriage, and issued bills of lading to the shippers signed by the master or agents of the vessel. The vessel proved unseaworthy and the cargo was lost. *Held*, that the company was liable over to the owners of the cargo and by subrogation to the insurers, and could recover its full value from the vessel owners under their express warranty of seaworthiness, in the charter party, even if technically the possession of the cargo was with the vessel owners.

The Act of June 26, 1884, c. 121, 23 Stat. 57, does not limit the liability of a ship owner upon his personal warranty of seaworthiness.

A charter party, containing a warranty of seaworthiness, purported to be entered into by a firm as agents of the vessel, but was signed in the firm name by one of its members who was part owner. *Held*, that the warranty was his personal contract.

An owner is liable on his express warranty of seaworthiness whether to blame for the breach or not.

217 Fed. Rep. 497, affirmed.

THE case is stated in the opinion.

Mr. Harvey D. Goulder and *Mr. Avery F. Cushman*, with whom *Mr. E. Henry Lacombe* was on the brief, for petitioner.

Mr. D. Roger Englar for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel brought by the Benner Line against the Pendleton brothers upon a charter party purporting to be made between "Pendleton Bros., agents of the schooner 'Edith Olcott'" and the libellant, and signed "Pendleton Brothers." The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage and that by reason thereof she sank and her entire cargo was lost. Both Courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side. As one of the Pendleton brothers was not interested in the vessel he was dismissed from the suit without objection. The other, the petitioner, who signed the firm name, being a part owner, was held by the District Court to be bound by the warranty of seaworthiness contained in the contract, but entitled to the statutory limitation of liability. Act of June 26, 1884, c. 121, § 18, 23 Stat. 57. 210 Fed. Rep. 67. The Circuit Court of Appeals held that the statute did not cover the case. 217 Fed. Rep. 497. 133 C. C. A. 349. A decree was entered against the petitioner for the total loss. Both Courts agreed that the Benner Line although owning none of the cargo was entitled to sue for the loss of it and this proposition and the matter of the applicability of the Act of 1884 are the two questions argued here.

The ground on which the right of the Benner Line to

recover the value of the cargo is denied is that the anomalous doctrine by which a bailee can recover the value of goods that he does not own (*The Beaconsfield*, 158 U. S. 503, 507), stands on the bailment, and that here there was no bailment to the Benner Line. The charter party provides that bills of lading be signed without prejudice to the charter. The bills of lading were signed by the master or agents of the vessel (the Benner Line), and, it is contended, bound only the vessel. The charter was not a demise of the ship, and it may be assumed, as the bill of lading seems to assume, that the technical possession of the goods was in the ship owners, since they remained in possession of the ship. The Benner Line has not paid or been called upon to pay anything to the owners of the cargo, but brings this suit at the request of the underwriters on the same, who have paid for the loss.

But as was observed by the Courts below, the Benner Line held itself out to the public as a common carrier, solicited and received the merchandise that it offered to transport, by acceptance of such merchandise contracted to be answerable for the transportation, chartered the vessels to carry what it received, employed the stevedores who put it aboard, fixed and received the freight and signed or had the bills of lading signed in its office. It determined the vessel on which the cargo should go as against the owners of it or of the ship. The cargo went in the space it had hired. We agree with the lower Courts that the Benner Line did not disappear from its contract to carry the goods when the bills of lading were signed and that it would have been answerable to the owners, or to the insurance companies when they became subrogated to the owners' rights, if they had elected to sue it. The owners of the vessel had warranted the seaworthiness of the ship to the charterer, of course in contemplation that a cargo would be shipped as to which they would be liable in some form. Wherever in theory of law the tech-

nical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Ed. IV, 34, pl. 9, is an example of what has been repeated from that day to this. See *Brewster* v. *Warner*, 136 Massachusetts 57, 59. Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. The whole question is hardly more than technical as there is no doubt that this suit really represents the owners' interests since it is brought at the request of the insurers who have paid the loss.

On the proposition that the petitioner is entitled to limit his liability under the Act of 1884 it is urged that the act is an absolute limit, irrespective of privity or knowledge, in regard to contracts as well as torts, and that this contract, if it bound the petitioner at all, did so only as an indirect result of its execution. The last point hardly is intelligible. The petitioner signed the charter with the name Pendleton Brothers, which included himself, and apart from the fact that although described as agents the Pendleton brothers purport to be contracting parties, if we look only to the principals the petitioner was one of them as part owner of the vessel. The contract was between human beings and the petitioner by his own act knowingly made himself a party to an express undertaking for the seaworthiness of the ship. That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon*, 222 U. S. 96. It was said in that case, p. 106, that § 18 leaves the owner "liable for his own fault, neglect and contracts." The principle was held to

apply to contracts less personal than this in *Great Lakes Towing Co.* v. *Mill Transportation Co.*, 155 Fed. Rep. 11, and in *The Loyal*, 204 Fed. Rep. 930. We are not disposed to disturb the very strong and deliberate intimations of *Richardson* v. *Harmon* in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not.

Decree affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* DODGE.

ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 378. Argued January 21, 1918.—Decided April 1, 1918.

A law of a State, governing a life insurance contract made locally between a resident citizen and a locally licensed foreign corporation, and prescribing how the net value of the policy shall be applied to avoid forfeiture if the premium be not paid, cannot be extended so as to prevent the policyholder, while present in such State, and the company from making and carrying out a subsequent, independent agreement in the company's home State, pursuant to its laws, whereby the policy is pledged as security for a loan and afterwards canceled in satisfaction of the indebtedness.

Such attempt to engraft the law of the policy upon the subsequent contract, so that the insurance shall remain enforcible in the courts of the State where the policy was issued without regard to its termination in satisfaction of the loan, is an invasion of the citizen's liberty of contract under the Fourteenth Amendment, and cannot be sustained through the license to the foreign corporation.

A life insurance policy, issued in Missouri to a resident and citizen of Missouri by a New York corporation with Missouri license, provided that the insured might obtain cash loans on the security of the policy on application at the company's home office, subject to the terms of its loan agreement, and that any indebtedness to the company should be deducted in any settlement of the policy or of any benefit thereunder. *Held*, that this imposed no obligation on the company to make a loan subject to a Missouri nonforfeiture law governing the policy and devoting three-fourths of its net value to satisfaction of premium indebtedness exclusively and extension of the insurance, in case of default.

Upon application, based on such a policy, addressed to the company at New York, accompanied by a loan agreement, both signed by the insured and beneficiary in Missouri, where both were resident citizens, and forwarded, with pledge of the policy as security, through the company's Missouri agent, and all received and accepted at its home office in New York, a loan was made, the amount being remitted by mail to the insured in Missouri in the form of the company's check on a New York bank payable to his order. The agreement declared, in substance, that it was made and to be performed entirely in New York under New York laws. Under it, in accordance with those laws, the pledge was foreclosed and the reserve of the policy extinguished in satisfying the loan. *Held*, that the agreement was a valid New York contract, independent of the policy, and that the foreclosure was a defense to an action on the policy in the courts of Missouri, notwithstanding a Missouri nonforfeiture statute (Rev. Stats. 1899, § 7897), devoting three-fourths of the net value to payment of premium indebtedness exclusively and in extension of the insurance, was there construed as continuing the insurance in force. 189 S. W. Rep. 609, reversed.

THE case is stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. James C. Jones* was on the brief, for plaintiff in error:

New York Life Ins. Co. v. *Head*, 234 U. S. 149, is so much like this case as practically to be decisive of it.

We do not claim the State could not pass a valid law prohibiting a forfeiture. Such laws have been passed in many States and their validity to the extent that they prevent forfeitures has not been questioned.

Massachusetts in 1861 was the pioneer in such legislation. "The purpose of the statute," said the Massachusetts court, "is merely to establish a rule which will enable the assured to reap the full benefits of the premiums paid before default on his part." *Carter* v. *John Hancock Ins. Co.*, 127 Massachusetts, 153; *Hazen* v. *Massachusetts Mutual*, 170 Massachusetts, 254.

Without any statute on the subject, this court has recognized the equitable rights of a policyholder who was prevented by war from paying his premiums. The reserve growing out of the premiums belongs in a sense to him who paid them. *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24. *Cf. Board of Assessors* v. *New York Life Ins. Co.*, 216 U. S. 517; *s. c.*, 158 Fed. Rep. 462.

The unused balance Dodge had with the company, the State could say must not be forfeited; but the State could not, without denying the liberty of contract, prevent the parties from making whatever fair agreement they chose to make, to the end that the insured should get back this sum in so many dollars, or in its equivalent in insurance benefits, or in any other proper way. The policy was the property of the insured and the beneficiary. They had a natural right to do with it as they pleased. If they wanted to sell it, they had a right to sell it. If they wanted to borrow money and pledge it as security, they had a right to do so. The company, as a money lender, had a right to lend it on any terms that were fair, and to accept as security the pledge of the policy. And when Dodge quit paying premiums, the company had a right to settle the indebtedness in accordance with the loan agreement and the policy and the laws of New York; and Missouri could not deny them any of these rights without depriving them of their liberty of contract.

The Missouri nonforfeiture law, as extended in this case into the property in question so as not merely to prohibit its forfeiture, but to deny the right or power to

use, dispose of, or deal about it in any way whatever, and, whether the parties interested in it so wished or not, to compel the use of it in the narrow way the statute states, is clearly an arbitrary interference with the right of contract, having no just relations to the protection of the public within the scope of legislative power. *Lawton* v. *Steele*, 152 U. S. 133; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; *McLean* v. *Arkansas*, 211 U. S. 539; *Smith* v. *Texas*, 233 U. S. 630; *Alabama & New Orleans Transp. Co.* v. *Doyle*, 210 Fed. Rep. 173; *Geiger-Jones Co.* v. *Turner*, 230 Fed. Rep. 233; *People* v. *Gilson*, 109 N. Y. 389; *State* v. *Dalton*, 22 R. I. 77; *Ex parte McKenna*, 126 California, 429; *Long* v. *State*, 74 Maryland, 505.

Loans of this character and their foreclosure in the way the loan in question was foreclosed are authorized by the New York Insurance Law, § 16. The New York courts have, without any exception, sustained the validity and finality of the foreclosure of a pledge in the way it was done in this case. *Clare* v. *Mutual Life Ins. Co.*, 201 N. Y. 492; *Palmer* v. *Mutual Life Ins. Co.*, 38 Misc. (N. Y.) 318; *Hayes* v. *New York Life Ins. Co.*, 124 N. Y. Supp. 792. And similar decisions have been rendered in many jurisdictions. The foreclosure canceled the debt and the policy, and ended all contractual relations between the parties. If the loan agreement were a Missouri contract, that fact would not in any respect affect the natural right of one of the parties to borrow and the other to lend money on the pledge of this policy as security, nor would it change the character of the pledge or the necessary legal effect of the foreclosure. The pledge would be as valid and its foreclosure as final in Missouri as anywhere. *Chouteau* v. *Allen*, 70 Missouri, 290. But the agreement is a New York contract and governed by the New York law which the parties expressly adopted. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Robinson* v. *Bland*, 2 Burr. 1077; *Pritchard*

v. *Norton*, 106 U. S. 124, 136; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *United States* v. *North Carolina*, 136 U. S. 211; *Coghlan* v. *South Carolina R. R. Co.*, 142 U. S. 101; *Hall* v. *Cordell*, 142 U. S. 116; *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329.

To entertain a suit commenced in 1915 on a policy which then had no existence and which had had no existence since the foreclosure in 1907 cut off all interest of the plaintiff in it, and to render judgment against the defendant upon this nonexistent contract, is to take the defendant's property without due process of law.

The allegations of the answer, the proof of the loan, the terms of the loan agreement, the pledge of the policy, the default, the foreclosure, the satisfaction of the indebtedness and the cancellation of the policy, the legal effect of it all under the laws of New York, are not denied or disputed in this case,—they are ignored; and by ignoring them the plaintiff, without any color of right, is given this judgment.

It will not do to say that if there is any injustice here it is mere error with which this court has nothing to do. Our day in court is not due process of law. The provisions of the Constitution protecting the property of persons "extends to all acts of the State, whether through its legislative, its executive or its judicial authorities." *Scott* v. *McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; *Twining* v. *New Jersey*, 211 U. S. 78; *Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586; *Ex parte Virginia*, 100 U. S. 339, 347.

The Missouri statute, as construed and applied in this case, denies the company the equal protection of the law, because it discriminates between it as a money lender on the one hand and every other money lender on the other, and deprives it of every right and of every remedy commonly accorded to a pledgee of property.

A State may exclude a foreign corporation; it may admit

it upon conditions; but it can impose no condition which will deprive the corporation of its constitutional rights. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Harrison* v. *St. Louis & San Francisco R. R. Co.*, 232 U. S. 318; *Phœnix Mutual Life Ins. Co.* v. *McMaster*, 237 U. S. 63.

As a matter of fact Missouri did not exact obedience to this nonforfeiture statute, as construed by its courts, as a condition of the company's admission to do business in the State.

Mr. James J. O'Donohoe, with whom *Mr. Louis H. Breuer* and *Mr. Jerre A. Costello* were on the briefs, for defendant in error:

That the policy in suit is a Missouri contract is not now a debatable proposition. And being a Missouri contract, the nonforfeiture statutes then in force entered into, and became part thereof, as much so as if copied therein. *Cravens* v. *New York Life Ins. Co.*, 148 Missouri, 583; *s. c.*, 178 U. S. 389; *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Lukens* v. *Insurance Co.*, 269 Missouri, 575.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, is inapplicable. In that case the insured was not a resident of Missouri. So far as we have been able to find, there is not a case in the books in which it appears that the assured was not a resident of the State, the laws of which were being invoked in behalf of the beneficiary as against the express terms of the insurance contract itself.

All applications for loans and all loan agreements were made in Missouri to plaintiff in error's St. Louis office. Neither the insured nor defendant in error was ever in the State of New York. And the loan agreements were not subsidiary or independent contracts. *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329. *Burridge* v.

Insurance Co., 211 Missouri, 178; *Christensen* v. *Insurance Co.*, 152 Mo. App. 551, 556; *Gillen* v. *Insurance Co.*, 178 Mo. App. 97; *McCall* v. *Insurance Co.*, 196 Mo. App. 333; *McKinney* v. *Fidelity Mutual Life Ins. Co.*, 270 Missouri, 305. The loan was made upon no new consideration, but in pursuance of the agreement contained in the original policy, and it was not a new contract. *Dannehauser* v. *Wallenstein*, 169 N. Y. 199; *McDonnell* v. *Alabama Ins. Co.*, 85 Alabama, 412; and cases *supra*.

When the policy was issued the insurer could not make the laws of its home State applicable either by the policy, loan application or loan agreement. *Whittaker* v. *Insurance Co.*, 133 Mo. App. 664, and cases cited. It attempted it not by the policy stipulations but by the loan application. This could not be done for the further reason that the application is no part of the policy, since it is neither attached to it nor indorsed thereon as required by § 7929, Mo. Rev. Stats. 1899. *Schuler* v. *Metropolitan Life Ins. Co.*, 175 Mo. App. 130. And for the same reasons, under the laws of New York, the application is no part of the policy. Con. Laws of N. Y., vol. III, p. 1714, § 58; *Becker* v. *Insurance Co.*, 153 App. Div. 382; *Murphy* v. *Insurance Co.*, 83 Misc. (N. Y.) 475. Such is the uniform rule of decision. *Ellis* v. *Metropolitan Life Ins. Co.*, 228 Pa. St. 230; *Paulhamus* v. *Security Life & Annuity Co.*, 163 Fed. Rep. 554. It follows, therefore, that the application should not be considered in this case. The policy stipulated that loans were to be made "on demand." No contract therefor was necessary. It is elemental that to become a part of the policy the company's loan agreement should be either set forth in the policy or attached thereto.

Section 7897, Mo. Rev. Stats. 1899, commands that three-fourths of the reserve value, less notes or other evidence of indebtedness given on account of past premium payments, shall be taken as a net single premium for

temporary insurance for the full amount written in the policy. No other evidence of indebtedness is deductible on policies issued from 1879 to the passage of the amendatory Act of 1903 (Laws 1903, p. 208). This statute has been held constitutional in the following cases. *Cravens* v. *New York Life Ins. Co.*, 148 Missouri, 583; *s. c.* 178 U. S. 389; *Horton* v. *Insurance Co.*, 151 Missouri, 604; *Burridge* v. *Insurance Co.*, 211 Missouri, 158. See also *Mun* v. *Insurance Co.*, 181 S. W. Rep. 609; *Turner* v. *Land & Timber Co.*, 259 Missouri, 15; *Schmidt* v. *United Order of Foresters*, 259 Missouri, 491; *Dennis* v. *Modern Brotherhood of America*, 231 Missouri, 211.

The liberty clause of the National Constitution refers to natural, not artificial, persons. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243; *Applegate* v. *Insurance Co.*, 153 Mo. App. 63.

The defenses founded on nonpayment of the loan and cancellation of the policy are, in the absence of statute, eliminated by the incontestability stipulation in the policy. *Haas* v. *Insurance Co.*, 84 Nebraska, 682; *Harris* v. *Insurance Co.*, 248 Missouri, 304.

A stipulation for forfeiting a policy as a penalty for the nonpayment of a loan, in the absence of statute, is in the nature of a usurious extortion and void. The reserve value of a policy is not its true value and it is only by statute it can be made such. Stipulations in policies and policy loan agreements intended to defeat the right of redemption are, in the absence of statute, void and inoperative to vest the absolute right and title in the pledged policy. [Citing numerous cases.]

In the absence of statute, the pledgee cannot confiscate the pledged property. Indeed he is bound to sell the pledged property and he cannot even become a purchaser at the sale. *Easton* v. *German-American Bank*, 127 U. S. 532; *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Harmon* v. *National Park Bank*, 172 U. S. 644.

There is no foreclosure provision, either in the policy or loan agreement, and none should be inserted or implied. *Tetley* v. *McElmurry*, 201 Missouri 394; *McCullom* v. *Insurance Co.*, 61 Mo. App. 352; *Gruwell* v. *K. & L. of Security*, 126 Mo. App. 496.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error brought suit January 27, 1915, in Circuit Court, Phelps County, Missouri, upon a policy dated October 20, 1900, on life of her husband, Josiah B. Dodge, who died February 12, 1912. She alleged: That plaintiff in error, a New York corporation, had long maintained local offices and carried on the business of life insurance in Missouri, where she and her husband resided; that in 1900, at St. Louis, he applied for and received the policy, she being named as beneficiary; that premiums were paid to October 20, 1907, when the policy lapsed, having then a net value, three-fourths of which, less "indebtedness to the company given on account of past premium payments" applied as required by the Missouri nonforfeiture statute (§ 7897) sufficed to extend it beyond assured's death. Further, that upon application by assured and herself presented at St. Louis the company there made him loans amounting, October 20, 1907, to $1,350, but of this only $599.65 had been applied to premiums. She asked judgment for full amount of policy less loan, unpaid premiums, interest, etc.

Answering, the company admitted issuance of policy, but denied liability because assured borrowed of it, November 1906, at its Home Office, New York City, $1350, hypothecating the policy there as security and then failed to pay premium due October 20, 1907, whereupon in strict compliance with New York law and agreements made there the entire reserve was appropriated to sat-

isfy the loan, and all obligation ceased. The assured being duly notified offered no objection. It further set up that as the loan, pledge and foreclosure were within New York the Federal Constitution protected them against inhibition or modification by a Missouri statute; and if intended to produce such result § 7897, Rev. Stats. Mo., 1899, lacked validity.

In reply, defendant in error denied assent to alleged settlement; maintained all transactions in question took place in Missouri; and asserted validity of its applicable statutes.

The Springfield Court of Appeals affirmed a judgment for $2,233.45—amount due after deducting loan, unpaid premiums, etc. 189 S. W. Rep. 609. It declared former opinions of the state Supreme Court conclusively settled the constitutionality of § 7897 and that the reserve, after paying advances for premiums, was thereby appropriated to purchasing term insurance, notwithstanding any contrary agreement. *Burridge* v. *Insurance Co.*, 211 Missouri, 158; *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329. Effort to secure a review by the Supreme Court failed.

Section 7897, Rev. Stats. of Mo., 1899, in effect until amended in 1903, provides: "No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, . . . shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed . . . and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance

shall be taken as a net single premium for temporary insurance for the full amount written in the policy; . . ." This section and number 7899 are in the margin.[1]

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[1] "Sec. 7897. Policies non-forfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive." (R. S. 1889, § 5856, amended—r.) [By Act of Missouri Legislature approved March 27, 1903, this section was amended by substituting for the words "any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled" the following ones: "any notes given on account of past premium payments on said policy issued to the insured, and any other evidence of indebtedness to the company, which notes and indebtedness shall be then canceled."]

"Sec. 7899. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered

Both defendant in error and her husband, the assured, at all times here material resided in Missouri. Being duly licensed by that State, plaintiff in error, responding to an application signed by Josiah B. Dodge at St. Louis, issued and delivered to him there a five thousand dollar twenty year endowment policy upon his life, dated October 20, 1900, naming his wife beneficiary but reserving the right to designate another. Among other things, it stipulated: "Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. Application for any loan must be made in writing to the Home Office of the company, and the loan will be subject to the terms of the company's loan agreement. The amount of loan available at any time is stated below, and includes any previous loan then unpaid. Interest will be at the rate of five per cent. per annum in advance." Continuation after failure to pay premium was guaranteed, also reinstatement within five years. It further provided: "Premiums are due and payable at the Home Office,

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by the value of the policy as determined in § 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: *Provided, however*, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; *and provided also*, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been foreborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid." (R. S. 1889, § 5858—t.)

unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within one month of grace, the liability of the company shall be only as hereinbefore provided for such case." "Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid will be deducted in any settlement of this policy or of any benefit thereunder."

By an application addressed to the company at New York accompanied by a loan agreement, both signed at St. Louis and "forwarded from Missouri Clearing House branch office, August 29, 1903," together with pledge of the policy—all received and accepted at the Home Office in New York City—the assured obtained from the company a loan of $490. Its check for the proceeds drawn on a New York bank and payable to his order was sent to him at St. Louis by mail. Annually thereafter the outstanding loan was settled and a larger one negotiated—all in substantial accord with plan just described. The avails were applied partly to premiums; the balance went directly to assured by the company's check on a New York bank. Copies of last application, loan agreement and instruction which follow indicate the details of the transaction.

[Application]

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $1,350.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said Company's Loan Agreement.

Said policy is forwarded herewith for deposit with said Company as collateral security, together with said Company's Loan Agreement duly signed in duplicate.

JOSIAH B. DODGE. LEO F. DODGE.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD, Cashier.

[POLICY LOAN AGREEMENT.]

Pursuant to the provisions of Policy No. 2054961 issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned has this day obtained a cash loan from said Company of the sum of thirteen hundred fifty dollars ($1,350 00), the receipt of which is hereby acknowledged, conditioned upon pledging as collateral said policy with said Company as sole security for said loan and giving assent to the terms of this Policy Loan Agreement; therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said Company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as sole security for the payment of said loan and interest and herewith deposit said policy with said Company at its Home Office.

3. To pay said Company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

(a) Either if any premium on said policy or any in-

terest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

(b) Or, (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said Company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this eighth day of November, 1906.

JOSIAH B. DODGE (L. S.) LEO F. DODGE (L. S.)

Signed and sealed in presence of GEO. T. LEWIS.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD. Cashier.

[Instruction.]

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 2,054,961.

Please deduct from the cash loan of $1,350.00 applied for on Nov., 1906, on the security of the above policy,

an amount sufficient to pay present loan and prem. and int. to Oct., '07.

JOSIAH B. DODGE. LEO F. DODGE.

Witness: Geo. T. Lewis.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD, Cashier.

The premium due October 20, 1907, not being paid, the company applied entire reserve in discharge of insured's indebtedness as provided by laws of New York and sent him by mail the fol'owing letter.

New York, December 17th, 1907.

Mr. Josiah B. Dodge, 4952 Maryland Ave., St. Louis, Mo.

Re Policy No. 2054961.

DEAR SIR: By a loan agreement executed on the 8th day of November, 1906, the above policy on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1350.00.

The premium and interest due on said policy on the 20th day of October, 1907, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value.

Yours truly, JOHN C. MCCALL, Secretary, By E. M. C.

This was received by assured December 19, 1907, and neither he nor the beneficiary, during his life, offered objection to the action taken.

That the policy when issued to Dodge became a Missouri contract, subject to its statutes, so far as valid and applicable, is undisputed and clear. The controlling doctrine in that regard was announced and applied in *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, and *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S.

243. In each of those cases the controversy related to the interpretation and effect of an original policy—not a later good faith agreement between the parties. We held that to the extent there stated the State had power to control insurance contracts made within its borders. With those conclusions we are now entirely content; but they do not rule the question presently presented. Here the controversy concerns effect of the state statute upon agreements between the parties made long after date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.

Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York where it was to be performed. And, moreover, that it is one of a kind which ordinarily no State by direct action may prohibit a citizen within her borders from making outside of them. It should be noted that the clause in the policy providing "cash loans can be obtained by the insured on the sole security of this policy on demand, etc.," certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make upon demand.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that State to place insurance upon property located there by contract made and to be performed beyond its borders. We said "the mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it," and ruled

that under the Fourteenth Amendment the right to contract outside for insurance on property within a State is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established. *Nutting* v. *Massachusetts*, 183 U. S. 553, 557; *Delamater* v. *South Dakota*, 205 U. S. 93, 102; *Provident Savings Assn.* v. *Kentucky*, 239 U. S. 103, 114; *Adams* v. *Tanner*, 244 U. S. 590, 595.

The court below rested its judgment denying full effect to the loan agreement upon *Smith* v. *Mutual Benefit Life Ins. Co., supra,* and *Burridge* v. *Insurance Co., supra.* In them the Supreme Court distinctly held § 7897 controlling and the insurer liable upon policies actually issued in Missouri notwithstanding any subsequent stipulation directing different disposition of reserve after default. In the latter it expressly approved the doctrine of the first and, among other things, (p. 171) said:

"Attending to that section [No. 7897] as it read when the policy issued and when the insured died, it will be observed that the net value of the policy is to be computed. Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company, *given on account of past premium payments on said policies.*' The residue, if any, then goes automatically to the purchase of temporary or extended insurance . . . In that [the Smith] case, therefore, the scope and meaning of that clause of our non-forfeiting insurance statute was held in judgment in the stiffest sense and this court decided that the statute was mandatory; that the *character* of the indebtedness to be deducted from the net value before applying the residue to the purchase of temporary or extended in-

surance must be looked to and was limited by the clear words of the statute 'to notes or other evidences of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured; and did not include notes and evidences of indebtedness arising in other ways. It is not apparent, assuming the statute be constitutional, how, giving heed to the hornbook maxim, *expressio unius*, etc., any other conclusion could have been arrived at in reason. It was held furthermore, in effect, that such provisions of law evidenced a sound and just governmental policy, and wrote into every policy of life insurance, coming within its purview, a mandate not to be abrogated in whole, or hedged about or lopped off in detail, by policy provisions, nor to be contracted away otherwise than as prescribed by statute."

Treating the loan to Dodge as made under a New York agreement which Missouri lacked power directly to control, the question presented becomes similar in principle to the one decided in *New York Life Insurance Co.* v. *Head*, 234 U. S. 149. There suit was instituted in Missouri upon a policy personally applied for and received while in that State by a citizen of New Mexico. Nine years afterwards, having duly acquired the policy in New Mexico, the transferee wrote from there to the insurer in New York and effected a loan under an agreement like the one now before us. The state courts held the policy a Missouri contract and the loan agreement controlled by its nonforfeiture statute.

Assuming the policy to be a Missouri contract, we declared that State without power to extend its authority over citizens of New Mexico and into New York and forbid the later agreement there made simply because it modified the first one. We said: "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York

and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." The reasoning advanced by the Missouri Supreme Court to support its ruling was thus summarized: "As foreign insurance companies have no right to come into the State and there do business except as the result of a license from the State and as the State exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the State as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law." And this argument we declared unsound since the "proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority—a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States."

Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making

beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co.* v. *Head*, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, § 7897 transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment.

Reversed.

MR. JUSTICE BRANDEIS, dissenting.

A statute of Missouri, Rev. Stats., 1899, § 7897, prohibited life insurance companies authorized to do business within the State from forfeiting a policy for default in the payment of premiums, if three full years' premiums had been paid thereon. The act provided further that in case of such default the policy should be automatically extended and commuted into paid-up term insurance. And it determined mathematically the length of the term, as that for which insurance could, at a rate prescribed, be purchased with a single premium equal in amount to three-fourths of the reserve or net value less any indebtedness to the company "on account of past premium payments." The obligation imposed upon the company by this statute, as construed by the highest court of the State, could not be modified by contract with the insured whether entered into at the time the policy was written or subsequently. *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Smith* v. *Mutual Benefit Life Insurance Co.*, 173 Missouri, 329. Such nonforfeiture laws are an exercise

of the police power; and, as insurance is not interstate commerce, the State's power in this respect is as great over foreign as over domestic corporations. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 566; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401; *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S. 243.

In 1900 Dodge, a citizen and resident of Missouri, applied in that State to the New York Life Insurance Company, a New York corporation, for a policy on his life in favor of his wife. The policy was delivered to the assured in Missouri where the company had an office and was authorized by the Missouri statute to do business; and there the first and later premiums were paid and, until his death, Dodge and the beneficiary lived and the company continued so to do business.

In 1906 Dodge entered into a supplemental agreement with the company by which he nominally borrowed $1,350, pledged his policy as collateral, and agreed that, in case of default in repaying the loan, the company might discharge it by applying thereto the reserve of the policy. In 1907 Dodge made default in payment both of the premium and of the loan. The reserve of the policy was then less than the amount due on the whole loan; but three-fourths of the reserve exceeded that part of the loan which had been applied to the payment of past premiums by $275.79. This excess, if applied in commutation for term insurance, would have extended the policy to December 23, 1912. The company claimed the right to use the whole of the reserve to satisfy the whole of the loan, so applied it, and notified the assured, on December 17, 1907, that its obligation on the policy ceased. Dodge died February 12, 1912. The beneficiary, insisting that by reason of the Missouri statute the policy was still in force when her husband died, brought suit thereon in a state court of Missouri and recovered judgment, which was affirmed by the Springfield Court of Appeals (189

S. W. Rep. 609); and the Supreme Court of the State refused a review. The case comes here on writ of error under § 237 of the Judicial Code. The company asserts that the loan agreement was made in New York; and, relying upon *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, contends that the state court, in denying full effect to that contract, deprived it of liberty, property, and equal protection of the laws in violation of the Fourteenth Amendment.

First: Was the loan agreement in fact made in New York?

The policy was confessedly a Missouri contract. Dodge, so far as appears, was never out of Missouri. Physically every act done by Dodge and the beneficiary in connection with the loan agreement, as with the policy, was done in Missouri: (a) They signed there the application for the loan; (b) they signed there the loan agreement; (c) they signed there the request upon the company to pay itself, out of the $1,350 nominally borrowed, the amount of an earlier loan with interest to October, 1907, and of the premium; (d) he delivered there (at the Missouri Clearing House Branch Office) the policy given as collateral and these three papers, which were forwarded by that office November 9, 1906, and received in New York three days later; (e) he paid there the balance of the premium, $116.40 in cash; for the sum of $1,350, nominally advanced then, was insufficient to pay off the then existing loan with interest and the accrued premium. Throughout these transactions the company was authorized to do business in Missouri and was, in these transactions, actually doing business there. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

Nothing was done in New York then except this: The papers received from the Missouri Clearing House Branch Office were examined and filed in the Home Office; and

certain calculations and appropriate entries in the books and on the papers were made there. No money was paid then to Dodge. The nominal advance was less than the amount, including accrued premium, then due by him to the company; and Dodge balanced the account by paying in Missouri $116.40. In 1903, when a similar loan agreement was made, the nominal amount of the loan exceeded the sum due for premiums by $486.91; and a check for that sum was drawn by the company in New York and sent by mail from there to Dodge in Missouri. In 1904 a further check for $92.10 was sent from New York by the company to Dodge under a similar loan agreement. Under the 1903 agreement the policy was delivered to the company and it had remained in the company's possession at the Home Office. But when the loan agreement here in question was made, nothing was done in New York except to examine and file the papers and to make the calculations and entries. No discretion was exercised there by the company's official. By the terms of the policy the company had already assented to the amount nominally advanced as a loan and to the rate of interest to be charged. The functions exercised by the officials at New York were limited to determining whether the calculations were correct and whether papers were properly executed and filed.

These acts so done by the company at its Home Office in connection with the loan agreement were similar in character to those performed when the policy was written. The application for the policy addressed to the company at its Home Office was likewise delivered at the Missouri Clearing House and forwarded to the Home Office. The application was considered and accepted in New York. The policy was executed there. It provided that the premiums and the insurance should be payable there. But such acts did not prevent the policy being held to be a Missouri contract. *Equitable Life Assurance Society*

v. *Clements, supra; Northwestern Life Insurance Co.* v. *McCue,* 223 U. S. 234. Even if the loan agreement be treated as an independent contract, it should, if facts are allowed to control, be held to have been made in Missouri. But the loan agreement was not an independent contract; nor is it to be treated as a modification of the original contract. It was an act contemplated by the policy and was subsidiary to it, as an incident thereof. What was done by the officials at the Home Office was not making a New York contract, but performing acts under a Missouri contract.

Second: What is the effect of the provision in the loan agreement that it shall be deemed to have been made in New York?

The provision "That the application for said loan was made to said company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said company" is inoperative. For acts essential to the making of any agreement involving a pledge of the policy were done by Dodge, by the beneficiary, and by the company's agent in Missouri and were subject to the prohibition of a statute of that State which prevented the operation there of inconsistent New York laws. If the laws of Missouri and of New York had left the parties free to contract insurance on such terms as they pleased, they might with effect have elected to be bound by the law of the State of their preference, whatever the place of the contract; in doing so, they would in effect have specified terms of the contract. But provisions in contracts for incorporating the laws of a particular State are inoperative, so far as the law agreed upon is inconsistent with the law of the

State in which the contract is actually made. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 554; *Knights of Pythias* v. *Meyer*, 198 U. S. 508. Where the validity of a provision is dependent upon the place in which the contract is made, the actual facts alone are significant. Persons resident in Missouri, who enter there into a contract which is specifically controlled by the laws of that State, cannot, by agreeing that a modification inconsistent with the requirements of the Missouri law shall be deemed to have been made elsewhere, escape the prohibition of the Missouri statute. The fact that one of the parties to the contract is a corporation and hence capable of having a residence also in another State, and that some acts in connection with the contract were done by it there, does not affect the result. The company, although a foreign corporation, was, for this purpose, a resident of Missouri, or at least, was present in Missouri. *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Dunlop Pneumatic Tyre Company* v. *Actien-Gesellschaft, etc.*, 1 K. B. (1902) 342.

Third: Even if the rules ordinarily applied in determining the place of a contract required this court to hold, as a matter of general law, that the loan agreement was made in New York, it would not necessarily follow that the Missouri statute was unconstitutional because it prohibited giving effect in part to the loan agreement. There is no constitutional limitation by virtue of which a statute enacted by a State in the exercise of the police power is necessarily void, if, in its operation, contracts made in another State may be affected. *Emery* v. *Burbank*, 163 Massachusetts, 326; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664. The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end

legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual to his personal liberty. Here the subject is insurance; a subject long recognized as being within the sphere of regulation of contracts. The specific end to be attained was the protection of the net value of insurance policies by prohibiting provisions for forfeiture; an incident of the insurance contract long recognized as requiring regulation. The means adopted was to prescribe the limits within which the parties might agree to dispose of the net value of the policy otherwise than by commutation into extended insurance; a means commonly adopted in nonforfeiture laws, only the specific limitation in question being unusual. The insurance policy sought to be protected was a contract made within the State between a citizen of the State and a foreign corporation also resident or present there. The protection was to be afforded while the parties so remained subject to the jurisdiction of the State. The protection was accomplished by refusing to permit the courts of the State to give to acts done within it by such residents (Dodge did no act elsewhere), the effect of nullifying in part that nonforfeiture provision, which the legislature deemed necessary for the welfare of the citizens of the State and for their protection against acts of insuring corporations. The statute does not invalidate any part of the loan; it leaves intact the ordinary remedies for collecting debts. The statute merely prohibits satisfying a part of the debt out of the reserve in a manner deemed by the legislature destructive of the protection devised against forfeiture. The provision may be likened to homestead and exemption laws by which creditors are limited in respect to the property out of which their claims may be enforced. When the New York Life Insurance Company sought and ob-

tained permission to do business within the State, and when the policy in question and the loan agreement were entered into, this statute was in existence and was of course known to the company. It has no legal ground of complaint, when the Missouri courts refuse to give to the loan agreement effect in a manner and to an extent inconsistent with the express prohibition of the statute. The significance of the fact that this suit was brought in a Missouri court must not be overlooked. See *Bond* v. *Hume*, 243 U. S. 15; *Union Trust Co.* v. *Grosman*, 245 U. S. 412.

New York Life Insurance Co. v. *Head*, *supra*, furnishes no support for the contention made by the company here. The facts differ widely in the two cases. There the insured was not a citizen or resident of Missouri and does not appear ever to have been within the State except at the time when the application was made and the policy delivered. Here the insured was at all times a citizen and resident of the State. There the insured had assigned the policy to his daughter, who was a citizen of New Mexico and, so far as appears, had never been within the State of Missouri. Here the insured remained the owner of the policy. There the loan agreement was made by the assignee, a stranger to the policy; and the assignment being accepted and acted upon by the company resulted in a novation of the contract. Here the loan agreement was made by the insured. There every act in any way connected with the loan agreement, whether performed by the company or by the assignee (the insured performed none) was performed in some State or Territory other than Missouri. Here every act was performed in Missouri except as above stated. If this court had held constitutional the statute of Missouri as construed by its Supreme Court in that case, it would have sanctioned, not regulation by the State of the insurance of its citizens, but an arbitrary interference by one State with the rights

of citizens of other States. On the other hand, to sustain the contention made by the company in this case would deny to a State the full power to protect its citizens in respect to insurance, a power which has been long and beneficently exercised. For the power to protect will be seriously abridged, if it is held that the State of Missouri cannot constitutionally prohibit those who are its citizens and corporations within its jurisdiction from contracting themselves out of the limitations imposed by its legislature, in the exercise of the police power, upon the contracts actually made within the State. And unless it is so abridged, the Missouri nonforfeiture law, as applied to the facts of this case, cannot be held invalid.

Nor does *Allgeyer* v. *Louisiana*, 165 U. S. 578, furnish support to the company's contention. Allgeyer, a citizen and resident of Louisiana, had made in New York, with a corporation organized and doing business there, an open contract for marine insurance to cover cotton to be purchased and shipped. Shipments to be covered were required to be reported by letter addressed to the company at New York. Allgeyer mailed in Louisiana such a letter addressed to New York City. A Louisiana statute made it a crime for any one to do any act to effect insurance in any marine insurance company which had not established a place of business within the State and appointed an authorized agent upon whom process might be served. The insurance company there referred to had not been authorized to do business in Louisiana and actually did no business there. Allgeyer was sentenced for mailing the letter. This court held that the statute was unconstitutional as construed by the state court, because it denied to a citizen of the United States rights guaranteed by the Fourteenth Amendment.

But the case did not require the court to decide whether a State could prohibit its citizens from making contracts with corporations organized under the laws of and doing

business in another State; nor whether the contract there involved had been made in New York; nor whether it was valid. And it did not in fact decide any of those questions; for they were not in issue. It was admitted (*a*) that the contract there involved—the open insurance policy—had been made in New York and (*b*) that it was valid. The only question presented to this court was whether the State, in order more effectually to enforce its foreign corporations act, could prohibit its citizens from doing, within the State, certain acts which were essential to the enjoyment of rights secured by such a valid contract made without the State. In the paragraph near the close of the opinion (p. 593) this is pointedly expressed:

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

The more elaborate discussion which preceded this paragraph makes clear the ground of the decision.

"In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." (P. 587.)

"In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made

outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent." (P. 588.)

"It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State." (P. 592.)

Fourth: Furthermore, the right of citizens of the United States which the *Allgeyer Case* sustained "is the liberty of natural, not artificial persons." *Northwestern Life Insurance Co.* v. *Riggs, supra,* p. 255. While a State may not (except in the reasonable exercise of the police

power) impair the freedom of contract of a citizen of the United States, "it can prevent the foreign insurers from sheltering themselves under his freedom." *Nutting* v. *Massachusetts*, 183 U. S. 553, 558; *Phœnix Insurance Co.* v. *McMaster*, 237 U. S. 63. The insurance company cannot be heard to object that the Missouri statute is invalid, because it deprived Dodge of rights guaranteed to natural persons, citizens of the United States. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 705; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576.

In my opinion the decision of the Springfield Court of Appeals should be affirmed.

MR. JUSTICE DAY, MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.

SMITH, AUDITOR OF THE PANAMA CANAL, *v.* JACKSON.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 457. Argued March 6, 7, 1918.—Decided April 15, 1918.

The Auditor for the Canal Zone has no authority to make deductions for rent of quarters, and because of absence, from the salary of the District Judge of the Zone, as fixed and appropriated for by Congress.

Intimated that, but for the character of the proceeding (mandamus) and doubt as to intent, damages would have been inflicted on the Auditor under Rule 23, for plain abuse of administrative discretion in prosecuting this writ of error after being advised by an opinion of the Attorney General and two decisions of the courts below of his manifest duty under the statute respecting the payment of the judge's salary.

241 Fed. Rep. 747, affirmed.

THE case is stated in the opinion.

Mr. Benjamin F. Harrah for plaintiff in error.

Mr. Joseph W. Bailey for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Congress provided for a district court of the Canal Zone, the appointment of a judge and the salary attached to the office. (Act of August 24, 1912, c. 390, 37 Stat. 565, § 8.) In due course the salary fixed was definitely appropriated for. It is apparent that some controversy arose as to whether the Auditor of the Canal Zone had the power to refuse to give effect to the act of Congress fixing and appropriating the salary by withholding such sum as he might think was due from the judge as rent for quarters in property belonging to the United States in the Canal Zone. We say this is to be inferred, because in 1915 the Secretary of War submitted to the Attorney General two questions: first, whether the district judge was entitled to the same privilege as to quarters in the Canal Zone there enjoyed by other employés of the Government; and second, if not. whether the Auditor had authority to deduct from the salary of the judge before paying it the sum which he considered due for rent of such quarters. Reversing the order in which the questions were asked, the Attorney General came first to reply to the second question and said: ". . . without specific authority no portion of the salary of an officer of the United States may be withheld. See 20 Ops. 626 (1893); *Benedict* v. *United States*, 176 U. S. 357 (1900). . . ."

While it is apparent that this ruling should have put the subject at rest, obviously the misconception of the

Auditor as to the nature of his powers prevented that result from being accomplished and the Auditor refused to carry out the act of Congress and deducted from the salary of the judge, fixed by Congress, not only a charge for rent of quarters, but a sum which he considered due because of the absence of the judge from the Canal Zone during a certain period. The judge thereupon commenced the proceeding which is before us to compel the Auditor to perform his plain duty under the law and pay the salary without the deductions. As the result of the action of the Auditor and the necessity for bringing the suit, the expense was occasioned the United States of calling a judge from the United States to hear the cause and Judge Clayton of the Middle and Northern Districts of Alabama proceeded to the Canal Zone to discharge that duty. He did so, stating the reasons which controlled him in an elaborate and careful opinion making perfectly manifest the error of the action of the Auditor and his wrong in refusing to observe the ruling of the Attorney General in the premises. (241 Fed. Rep. 747.) From the consequent judgment directing the payment of salary to be made without the deductions the Auditor prosecuted error from the Circuit Court of Appeals for the Fifth Circuit, in which court the judgment below was affirmed, and it is a further writ of error prosecuted by the Auditor from this court to that ruling which brings the subject-matter before us now.

The expense of printing a voluminous record has been occasioned and the views of the Auditor have been pressed before us in a printed argument of more than one hundred pages. We think, however, that we need not follow or discuss that argument, as we are of opinion that it is obvious on the face of the statement of the case that the Auditor had no power to refuse to carry out the law and that any doubt which he might have had should have been subordinated, first, to the ruling of the Attorney

General and, second, beyond all possible question to the judgments of the courts below. It follows, therefore, that the prosecution of the writ of error from this court constituted a plain abuse by the Auditor of his administrative discretion. In an ordinary case the situation would be one not only justifying but making it our duty to direct the enforcement of Rule 23 as to damages. As, however, the judgment is not one for money but relates solely to the obligation to perform a manifest public duty, and plain as may have been the abuse of discretion committed, we are fain to believe it involved no intentional disregard of official duty, we pass that subject by and our order will be

Judgment affirmed.

SPRING VALLEY WATER COMPANY *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 211. Argued March 19, 1918.—Decided April 15, 1918.

Money placed in a bank as special deposits, pursuant to orders of the District Court and stipulation of parties, to await the outcome of litigation, *held* subject to assessment for taxation as money in litigation in possession of a "receiver," under Political Code of California, § 3647.

Such special deposits are sufficiently described for purposes of assessment by the numbers of the several cases in which they were made and by designating the court and the parties; and the facts that the deposit in each case was not assessed separately, and that the description included also a case in which there was no deposit, do not vitiate the assessment.

225 Fed. Rep. 728, affirmed.

In 1908 the Spring Valley Water Company, the appellant, commenced in the Circuit Court of the United States for the Northern District of California a suit against the City and County of San Francisco to enjoin the enforcement of an ordinance fixing the water rates for that year. A preliminary injunction was granted upon the condition that all sums collected by the Water Company from its customers in excess of the ordinance rates should be deposited in a bank agreed upon by the parties or designated by the court to await the outcome of the litigation. The sums so collected, it was provided, should be received by the bank as a special deposit subject to the order of the court and should be paid out on checks drawn by a special master and countersigned by a judge of the court. Pursuant to a stipulation of the parties the court subsequently designated the Mercantile Trust Company of San Francisco as the depository for the impounded moneys and ordered that the account should be entitled "Spring Valley Water Company—Special Account" and should bear two per cent. interest per annum. Each year following down to 1913 the Water Company brought a similar suit to enjoin the ordinance fixing water rates for the respective year. In four of these five cases a preliminary injunction was granted upon the same condition expressed in the preliminary injunction awarded in the 1908 suit. In the fifth, although a preliminary injunction was granted, no order was made concerning the impounding of sums collected in excess of the ordinance rates, but the parties stipulated that the moneys collected during the year embraced by that suit should also be deposited in the bank designated by the court to await the final outcome of the case. Pursuant to these orders and stipulations the Water Company made deposits of the moneys in the Mercantile Trust Company of San Francisco and from time to time the court, to safeguard the funds, ordered portions of it

transferred from that bank to six other banks in San Francisco. The money thus transferred and deposited in the six banks was placed in special accounts subject to the order of the court, to be withdrawn only by check signed by the special master and countersigned by a judge of the court.

The moneys on deposit in each of the seven banks on the first Mondays in March, 1913 and 1914, were by the local officer assessed for taxation for those years. In each assessment the bank was described as "Receiver of Impounded Moneys" and "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14,275, 14,735, 14,892, 15,131, 15,569, 15,344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." With the exception of No. 14,275 (which was a suit begun in 1907 to enjoin the water rates of that year and in which the court made no order concerning the impounding of funds and no deposits were made by the Water Company) the suits referred to are those which we have previously mentioned. On application of the tax collector of the City and County of San Francisco the District Court of the United States after notice and a hearing directed the payment of the taxes. As there were two assessments against each of the seven banks, the court issued fourteen orders and to reverse the decrees of the court below affirming the action of the trial court fourteen appeals are prosecuted. (225 Fed. Rep. 728.) While the order under review on this record concerned the assessment of moneys in the possession of the Mercantile Trust Company of San Francisco in March, 1913, and directed the payment of taxes in the sum of $8,479.89, there is a stipulation that the appeals in the other thirteen cases (Nos. 212 to 224) are to be determined by the decision in this.

Mr. Ira A. Campbell, with whom *Mr. Edward J. McCutchen* and *Mr. A. Crawford Greene* were on the brief, for appellant.

Mr. Robert M. Searls, with whom *Mr. George Lull* and *Mr. J. F. English* were on the brief, for appellees.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The sole ground urged for reversal is the invalidity of the assessment (a) because it was not authorized by any statute of the State and (b) because it did not contain a sufficient description of the property assessed, and we come to consider these objections under two headings.

(a) That the assessment was authorized by the following section of the Political Code of California we think is clear.

"Section 3647. Property and money in litigation. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver and the taxes be paid thereon under the direction of the court."

Without following and directly answering the argument advanced to sustain the contrary view, we content ourselves with a summary statement of the reasons for our conclusion. Words cannot make clearer than does the language of the text the purpose of the section to tax property or money in litigation in the hands of a court. Indeed the Supreme Court of California has so construed the section. *Los Angeles* v. *Los Angeles City Water Co.*, 137 California, 699; *Bessolo* v. *City of Los Angeles*, 169 Pac. Rep. 372. It is further manifest that the taxation of the money deposited in the injunction suits was what was sought to be accomplished by the assessment which was made. The money assessed was in litigation,

was in the custody of the court and was by its direction placed in the bank in a special account subject to the control of the court. Moreover the assessment to the bank which held the money for the court was a direct compliance with the terms of the section, the description "receiver" being employed in the statute not in a technical sense but as embracing any person acting as agent or depository of funds for a court. To give to the word the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute.

(b) It is contended that the assessment was invalid for want of sufficient description of the property assessed, first, because the assessment purported to assess moneys impounded in the 1907 injunction suit, No. 14,275, when as we have seen no money was in fact deposited in that suit, and second, because the assessment did not separately assess the moneys impounded in each of the six suits but assessed as a unit all the moneys impounded in all the suits.

As to the first, it is apparent that the inclusion of the 1907 suit, No. 14,275, could not operate to assess moneys which had no existence and hence the reference to that suit is wholly negligible. As to the second, the assessment referred to the cases by number and designated the court in which they were pending as well as the parties. The court in exercising its jurisdiction over the moneys had specifically directed their deposit to special accounts in each suit separately, thus enabling it at the termination of the litigation to distribute the funds after apportioning the sum of the tax chargeable to each. It is thus clear that not only was there no want of definiteness in the description of the property but no possible detriment to the Water Company could in any event arise because of the method of assessment which was followed.

Affirmed.

CITY OF MITCHELL *v.* DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 198. Argued March 15, 18, 1918.—Decided April 15, 1918.

The District Court has jurisdiction over a suit in which a telephone company, occupying streets of a city under ordinances passed pursuant to state law, seeks to enjoin, as an unconstitutional impairment of its contract rights and as involving a destruction of its property in violation of the due process clause of the Fourteenth Amendment, the execution of a later ordinance or resolution by which the city declares the company's rights at an end, assumes power to terminate them, notifies it to remove its lines and exchange and declares a purpose to take steps to secure their removal.

In a suit by a telephone company against a city involving the question whether plaintiff's right to operate its city exchange system was included with its right to operate its long distance system under a later, existing ordinance contract, or was confined to an earlier ordinance contract which had expired, the state supreme court in another case between the parties having treated the ordinances as independent in adjudging the city entitled to share in the gross receipts under a provision of the former not contained in the latter, *held*, that the judgment, if not actually conclusive upon the District Court, must be accepted as of much weight in determining whether the later ordinance replaced the earlier and gave new contract rights to operate the city exchange.

Grants of rights or privileges by a State or its municipalities are strictly construed; what is not unequivocally granted is withheld; nothing passes by mere implication.

Having granted a nonexclusive right to use streets, etc., for the operation of a local telephone exchange, under which a local system was established, a city passed an ordinance granting the privilege of operating "long distance telephone lines" "within and through" the city, for supplying facilities to communicate "by long distance telephone" or other electrical devices, with parties residing "near or at a distance from" the city; and then another changing the word "lines" to "system," and expressing the proposed communication as with

parties residing "*in*, near or at a distance from" the city. The grantee under the later ordinances acquired the local system, and was also engaged in supplying the city with long distance telephone service. *Held*, that it would be unjustifiable implication to construe the last ordinance as granting a new term for the local exchange system, and such implication could not be supported by interpreting the term "long distance telephone," apart from its usual meaning, as describing the character of instruments and instrumentalities to be employed rather than their sphere of operation.

Reversed.

THE Dakota Central Telephone Company, herein called the telephone company, brought suit against the City of Mitchell, herein called the city, to enjoin it from enforcing or attempting to enforce a resolution or ordinance of the city passed March 17, 1913, terminating the right of the telephone company to maintain and operate the company's system of telephones and requiring the removal of its poles, etc., from the streets and to declare the resolution or ordinance unconstitutional and void.

The bill alleges the following facts, which are the basis of the contentions of appellant. We state them narratively:

The telephone company is a South Dakota corporation, and under § 554 of the Civil Code of the State has been given the power to operate telegraph and telephone lines within the towns and cities of the State and to use the public grounds, streets, alleys and highways, subject to control of the proper municipal authorities as to which of them the lines shall run over and across, and the places where the poles to support the wires shall be located.

Since its incorporation the company has acquired by purchase and construction certain lines of telephone and certain telephone exchanges and has been engaged as a common carrier in transmitting telephone messages, is so engaged in about 85 cities, and has about 265 tele-

phone stations, other than exchanges, situated in South Dakota, North Dakota, and Minnesota, and has also, outside of the lines situated in cities and towns, about 85 exchanges, about 265 stations and about 5,000 miles of telephone lines.

May 11, 1898, the city granted by ordinance to F. E. Elce and his associates, heirs and assigns, a right to use the streets and alleys of the city for the maintenance of a public telephone system. The right granted was not exclusive.

Elce duly accepted the terms and conditions of the ordinance and installed a local telephone system and conducted and operated it until on or about July 8, 1904.

The Dakota Central Telephone Lines, a South Dakota corporation, was given by ordinance dated March 21, 1904, and numbered 174, authority to use the streets of the city for the purpose of operating long distance telephone lines within and through the city "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell." In consideration of the ordinance the city was given the right to string wires on the poles of the company for fire alarm purposes.

The ordinance proved insufficient for its purpose and on June 6, 1904, a new ordirance was passed. The latter ordinance amended § 1 of the other so as to enable communication "with parties residing *in*, near or at a distance from Mitchell." The word in italics was the amendment. And the word "lines" in ordinance No. 174 was changed to the word "system" in ordinance No. 180.

At the time the last ordinances (Nos. 174 and 180) were passed the telephone instruments then in general use could not be used successfully for long distance conversations, but there had been developed instruments for such conversations. Such telephones were then known

as "Long distance telephones" and were only supplied to subscribers at telephone exchanges by special arrangement with the individual subscribers, who desired an instrument efficient for both local and long distance conversations. At said time, however, the art had so far advanced that the public in general were demanding the installation of "Long distance telephones" in local telephone exchanges.

Long prior to the adoption of ordinances 174 and 180 the Southern Dakota Telephone Company had constructed in the city of Mitchell and other towns and cities of the State and had secured the consent of Mitchell to the construction in that city of such lines, commonly known as "Toll lines" as distinguished from telephone exchanges. In 1903 the Dakota Central Telephone Lines purchased those toll lines and was operating them at the time of and long prior to the adoption of ordinances 174 and 180.

That company, relying upon the consent of the city as expressed in ordinance 174, purchased from Elce the property then and now known as the Mitchell Telephone Exchange, consisting of the poles and other property as well as certain real property used in connection therewith. After entering into the contract to purchase and upon discovering the insufficiency of ordinance 174, the company applied to the city for ordinance 180, and when it was passed completed the purchase from Elce and took possession of the property and owned and operated the exchange with all other exchanges until October 2, 1904, when it sold all of its rights to complainant, Dakota Central Telephone Company, and the latter company has since continuously operated the exchange and toll lines.

Thereafter there was such improvement in telephone instruments and appliances that it became desirable to reconstruct the telephone exchange in the city, and in order to install a telephone system known as the "Auto-

matic" it became necessary to put in permanent underground ways in which to place the wires and cables and otherwise construct and install expensive instruments, and in order to be secure in making such extensive improvements the company applied for and obtained permission by ordinance "to place, construct and maintain through and under the streets and alleys, and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances." [This is referred to hereafter as the resolution of April 10, 1907.]

Relying on the ordinance [resolution] and the other ordinances, the company began to reconstruct and extend its telephone exchange in the city, and continued such work until the plant was thoroughly prepared for the installation of the "Automatic System." As part of the improvements the company erected a fireproof exchange building, it and the system causing an expenditure of $110,000. The system is now in operation and has about 1100 subscribers, all of whom are in direct communication and can communicate with persons at all the exchanges and stations of the company's telephone system in South Dakota, North Dakota, and Minnesota.

The company has complied with all of the requirements of the ordinance and has acquired a vested right to maintain and operate the exchange and lines described.

The company owns and operates lines from the city to other cities and other States than South Dakota (these are all mentioned in the bill) and the tolls for such interstate communication amount to more than $4,000 a month. It has also contracted with the United States Government whereby it receives and transmits and delivers the messages of the officers of the Weather Bureau to 32 cities and towns situated on its lines in South Da-

kota. It also furnishes telephone service to other officers of the Government in various towns and cities and places, and that this service may not be interfered with it seeks relief.

The city, assuming it had the right to require the removal of the company's lines and exchange from the city and from the streets and alleys therein, and assuming that the rights of the company would expire May 11, 1913, and further assuming the right to terminate the company's rights, did, on March 17, 1913, notify and request it to remove from the city its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the city and that if it failed to do so, the city would take steps to secure the immediate removal of the described instruments.

At the same meeting the city adopted two other resolutions, one called "Telephone Resolution," by which it declared the right of the company terminated from and after May 11, 1913, and in which it directed the officers of the city not to contract with the company for telephone service and on the said date to terminate all relations with the company; the other, called "Fire Alarm Resolution," which also declared the rights of the company terminated May 11, 1913, and then provided for the fire alarm service to take the place of that supplied by the company.

The threatened removal and consequent destruction of the company's telephone system and the deprivation of rights will cause the company damage to the amount of $110,000.

Besides the above facts the bill alleges that the ordinance or resolution of the city for the removal of the poles and lines of the company has the force and effect of a law of South Dakota within the intent and meaning

of § 10, Art. I, of the Constitution of the United States and, so construed, is a law impairing the obligation of the contracts existing between the company and the city. That the value of the company's exchange and lines consists largely in installing the poles, wires and other apparatus; that if taken down the salvage will be nominal and that therefore the removal thereof will deprive the company of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. That the wrongs done and threatened will also obstruct and interfere with the dispatch and transmission of interstate business in violation of the Constitution and laws of the United States and of the act of Congress regulating interstate commerce.

An injunction was prayed.

The answer of the city in most part tenders only issues of law; in other words, the effect of the ordinances of the city. The following facts, however, are averred, stated narratively: The company, for a long time after the passage of ordinances 174 and 180, made no claim that its local exchange was not maintained and operated under ordinance 135 (ordinance of Elce) or that that ordinance was in any way repealed or superseded or modified by the other ordinances or that the company was operating a local telephone system under those ordinances, but, on the contrary, the company has complied with all of the terms and conditions of ordinance 135.

The company has frequently negotiated with the city for a renewal or extension of its franchise from and after May 11, 1913, but a renewal or extension has not been granted; and both the company and the city have construed ordinance 135 as in full force and effect and it has in no way been repealed, superseded or modified.

The company did not inform the city or any of its officers of its desire to install an automatic telephone

system and made the improvement with full knowledge of the city's attitude, and in the early part of the year 1913 the company attempted to force the automatic system into the city, regardless of the wishes of the municipal authorities, by securing the consent of the individual citizens thereof to the installation of such telephones, and immediately upon learning of such attempt the city council, March 26, 1912, passed separate resolutions defining the city's attitude.

The company is operating two systems in the city, a local and a long distance system, the former under ordinance 135, (that granted to Elce) and the latter under ordinances 174 and 180; that the rights under ordinance 135 expired May 11, 1913, that the resolutions of which the company complains apply only to ordinance 135, that is, to the local telephone exchange, and do not and were not intended to apply to the long distance system, and the city expressly denies any purpose or intention to interfere with or molest the company in the maintenance and operation of the long distance system.

The city pleads a judgment rendered in a suit in which it was complainant against the company, by which the rights that the latter now asserts were adjudicated against it, and prays, by reason of the premises, that the bill of the company be dismissed.

After hearing, upon a stipulation of certain facts and oral testimony, a decree was entered adjudging the ordinance of the city of March 17, 1913, unconstitutional and void in that it impaired the obligations of the contract contained in ordinance 180, in violation of § 10, Art. I, of the Constitution of the United States, and deprived the company of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and enjoined the city from enforcing the ordinance.

This appeal was then allowed.

Mr. Lauritz Miller, with whom *Mr. Edward E. Wagner* was on the brief, for appellant.

Their contention on the jurisdictional question was as follows: The resolution sought to be enjoined has not such dignity or force of law as could impair the obligation of an existing contract, or deprive plaintiff of anything without due process of law. *City of Mitchell* v. *Dakota Central Telephone Co.*, 25 S. Dak. 409–420.

Conceding for the purpose of argument that the resolution has the force of law, still it does no more than declare the city's position upon the question at issue, and impairs no vested right, nor deprives the company of anything it already possessed. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178; *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 517–530; *Hamilton Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *Curtis* v. *Whitney*, 13 Wall. 68.

The distinction between the provisions of the resolution and the one under consideration in *Iron Mountain R. R. Co.* v. *Memphis*, 96 Fed. Rep. 113, that is to say, the reason for the application of the rule contended for by the plaintiff in the latter, while it should not be applied to this case, is clearly pointed out by Mr. Justice Holmes in *Des Moines* v. *Des Moines City Ry. Co.*, *supra*. It was the element of force contemplated by the resolution in the *Memphis Case* which the court thought deprived the company of its property without due process. In this case, as we have seen, the resolution notified the plaintiff company of the expiration of its rights under Ordinance No. 135, and that unless it removed its poles, etc., the city "would take such steps as might be necessary to secure the immediate removal of said poles, etc."

Mr. T. H. Null, with whom *Mr. Max Royhl* was on the brief, for appellee. As to jurisdiction:

The resolution of March 17, 1913, was equivalent to a law of the State impairing the obligation of appellee's contract rights. See *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306, 314. It was within the scope of powers delegated by statute to the city. It is immaterial whether the action is labeled "ordinance" or "resolution." But that the impairment may be by resolution is too well established to be open for discussion. *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453; *Iron Mountain R. R. Co.* v. *Memphis*, 96 Fed. Rep. 113; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Shawnee*, 183 Fed. Rep. 85.

Appellant attempts to bring this case within the rule in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178; and *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179. In the *St. Paul Case*, the court says, "No legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract did or could result." In the *Dawson Case*, the court says, "There was no legislation subsequent to the contract." In the *Des Moines Case*, the court says, "We are of the opinion that this (the city resolution) is not a law impairing the rights alleged by appellee." "That the only menace to appellee was the direction to the city solicitor to bring suit to determine the right of the parties." The present case comes squarely within the rule announced in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58. There the offending ordinance required the telephone company to remove its poles and wires from the streets within a reasonable time and upon failure to remove the mayor was directed to have them removed. In the case at bar the ordinance or resolution terminates the rights of the company and declares the company shall have no right after May 11, 1913, to operate a telephone exchange and requires the company to forthwith on May 11, 1913, remove its property from the

streets and in case of its failure to so remove the city council will secure the immediate removal of the same. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Shawnee, supra;* and *Northern Pacific Ry. Co.* v. *Duluth, supra.*

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

Counsel agree that the issues on this appeal are: (1) The jurisdiction of the District Court. (2) The scope and interpretation of ordinances Nos. 174 and 180. (3) Whether the judgment pleaded by the city is *res judicata.*

The first proposition needs but little comment. The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances and hence invoked against the city the contract clause of the Constitution of the United States and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions. The District Court, however, sustained both, resting its decision upon the opinion of the Supreme Court of the State in a suit by the city against the telephone company. *City of Mitchell* v. *Dakota Central Telephone Co.*, 25 S. Dak. 409. We shall presently consider this case. For the disposition of the present contention it is enough to say the case was brought by the city to recover a percentage of gross receipts of the company as provided in ordinance 135. In resistance the company contended that the provision was inserted without authority and was illegal and void, and contended besides that its rights in the streets were not derived from the city but from § 554 of the Civil Code of the State and that it was not competent for the city to impose conditions upon the

company. The court rejected the contentions and held that under the constitution of the State the city had the right to grant or withhold its consent to the use of its streets, and it necessarily had the right to grant the same upon such terms and conditions as it might choose to impose.

Applying the case, the District Court sustained the validity of ordinance No. 135, but decided that it expired by limitation of time in May, 1913, and that necessarily the rights granted by it terminated on that date, and that the company's rights, if it had any, were derived from ordinance 180 and the resolution of April 10, 1907.[1] The court considered the former a valid exercise of the power of the city and a contract between it and the company which was impaired by the subsequent resolutions.

It will be seen, therefore, that the company invoked rights under the Constitution of the United States and the District Court considered them to be substantial, not formal, and accordingly exercised jurisdiction.

The second and third propositions mingle in discussion. The District Court decided, as we have said, that ordinance 180 constituted a contract between the city and the company, and, exerting the right to interpret it, further decided that it gave the company the right to occupy the streets and compelled an injunction against the city's resolution and attempt to remove it. We shall spend no time in vindication of the exertion of the right; it is an established right of the federal courts, when the

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[1] "Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct and maintain through and under the streets and alleys, and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

contract clause of the Constitution of the United States is invoked, and we pass immediately to the consideration of ordinance No. 180. As we have seen, it was preceded by some years by ordinance No. 135, and by some months by ordinance No. 174. It was passed, it is contended, to complete the latter; in what respect we shall presently consider.

The case centers upon the ordinance. The telephone company contends that it gives the company the right to operate not merely long distance lines, but a local telephone exchange within the city. In other words, the contention is that it superseded ordinance No. 135 and became a new source of right, a right both of long distance and local exchange. The city opposes this construction and insists that the ordinance confers only the right to maintain a long distance system; that the right to a local exchange was given by ordinance No. 135 and expired with the expiration of that ordinance, May, 1913. And the city urges that its characterization of ordinance No. 180 was sustained by the Supreme Court of the State in *City of Mitchell* v. *Dakota Central Telephone Co.*, *supra*.

Counsel are at odds as to the case. It, as we have seen, was brought by the city against the company to recover a certain percentage of the gross receipts of the company, provided to be paid by § 4 of ordinance No. 135. One of the defenses of the company was that that ordinance was in effect repealed and superseded by ordinance No. 180 so far as it related to the payment of the percentage of the gross proceeds of the company. The Supreme Court decided against the defense, reversing the judgment of the trial court. The court, in answer to the contention of the company, held that ordinance No. 180 did not "have the effect of repealing, qualifying, or modifying ordinance No. 135, and the fact that the defendant [the company] paid the 10 per cent. on its gross proceeds for two years subsequently to the adoption of ordinance

No. 180 clearly shows that it did not claim, for a time at least, that ordinance No. 180 in any manner affected the prior ordinance . . . There is clearly no inconsistency between the two ordinances; one being for a local city telephone system, and the other being for a long distance telephone system."

The court also decided that the resolution of the city of April 10, 1907, had not the effect of repealing ordinance No. 135, but had only the purpose of giving to the company permission to place its wires underground instead of stretching them on poles in the streets.

The decision would seem to need no comment. It clearly adjudged that the ordinances had different purposes, and that ordinance No. 135 was not repealed in any particular by No. 180, the former applying to the local system and the latter to the long distance system.

The District Court, however, did not give the decision this broad effect but considered that it concluded only "that the two ordinances did not cover so exactly the same field and scope that it could be fairly said that the city intended by the passage of ordinance No. 180 to repeal ordinance No. 135." It is not very obvious how ordinance No. 135 could exist for one purpose and not for all the purposes for which it was enacted; how it could exist for the exaction of a revenue from the system and not exist for the system; how it could co-exist for nine years with No. 180 and yet have been superseded by the latter. Besides, the Supreme Court distinguished between the two ordinances, declaring that there was no inconsistency between them, "one being for a local city telephone system, and the other being for a long distance telephone system." The decision, indeed, gave emphasis to the distinction. From the operation of one a revenue was exacted, upon the other no condition was imposed.

It is, however, alleged in the bill that the company had

by certain enumerated acts acquired a vested right to maintain and operate its telephone exchange and lines, and to secure its peaceable enjoyment of such rights as against the wrongful acts of the city it brought this suit. This idea is not pressed in the argument and is not sustained by the stipulated facts. The case is rested upon "the scope and interpretation to be placed upon Ordinances Nos. 174 and 180," the contention being that they constitute a contract the obligation of which the resolution of the city, requiring the removal of the company's poles and wires from the streets, impairs. And such was the decision of the District Court. The basis of the contention and decision is that those ordinances superseded ordinance No. 135, taking the place of the latter, giving all the rights of a local exchange as the latter did and adding to them the rights of a long distance system; and this conclusion is deduced from the words of the ordinances and explanatory circumstances, the necessary connection, it is said, and the utility of the local system to the long distance system.

First, as to the titles of the ordinances and the words of each that are said to be determinative of their meaning. The title of No. 174 is as follows: "An ordinance to grant permission to the Dakota Central Telephone Lines (Inc.), their successors or assigns, the right to erect poles and fixtures, and to string wires for the purpose of operating long distance telephone lines, within and through the city of Mitchell, South Dakota."

Section 1 provides that "the right and privilege given" shall be for a period of twenty years "for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions therein named."

The title of ordinance No. 180 is exactly the same as

that of No. 174, except that the word "lines" of the latter is changed to the word "system" by the former. Section 1 of No. 180 is the same as section 1 of No. 174, except certain immaterial changes and except the word "in" in the provision expressing the purpose of the granted privilege to be "to communicate by long distance telephone or other electrical devices with parties residing *in*, near or at a distance from Mitchell . . ."

Stress is put upon the words "system," "within," "through," "in," and "near," and it is insisted that they were necessarily intended to accommodate the residents of the city and to give them the facilities of local and long distance telephone service and that something more was intended than to grant a mere right to carry long distance telephone wires through the city.

The contention has its strength and persuaded the District Court, but it is countervailed by other considerations. Undoubtedly the inducement of ordinances Nos. 174 and 180 was to give to the residents of the city long distance telephone facilities, but it cannot be said that granting such right inevitably or even naturally repealed or superseded the right to operate a local system which was given and then existed under ordinance No. 135, and which then had nine years to run. Besides, the decision of the Supreme Court is a factor of controlling strength. It explicitly decided that ordinances 135 and 180 had distinct purpose and operation and that the latter did not repeal or supersede the former. The issue was tendered by the company and the decision upon it is conclusive against the company.

But if the decision be not given that extent, as it was not by the District Court, and if it be considered that the latter court had a right, as a federal court, to determine the existence of a contract and its elements, such right does not preclude a deference to the views of the state court, which, moreover, have the support of principles

declared by this court, that grants of rights and privileges by the State or of any of its municipalities are strictly construed "and whatever is not unequivocally granted is withheld; nothing passes by mere implication." *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 34; *Blair* v. *Chicago*, 201 U. S. 400, 471.

The contentions of the company in the case at bar rest entirely upon implication, the implication of a repeal of one ordinance by another, which is never favored, though the ordinances expressed different purposes and could, and did co-exist for such purposes; and this implication is made to depend upon another, that is, that the ordinary meaning of the words "long-distance telephone" used in ordinance No. 180 is translated to signify and derive meaning from the function of the instrumentalities employed, such as transmitters, receivers, poles, wires, switching devices and battery systems, etc.

We may conclude the discussion with the observation that if ordinance No. 180 had been intended to embrace and continue the right granted by ordinance No. 135 and to grant a further right of a long distance telephone system, there was a simple and direct way of doing it, clear to every understanding, and it would not have been left to be collected from disputable circumstances and the function of instruments known only to experts. At any rate, as it has been so left, the ambiguity resulting must be resolved against the telephone company. It should have taken care that the right it sought was clearly defined.

It will be observed that the city expressly declares that it does not intend to interfere with or molest the telephone company in the maintenance and operation of the long distance system, and that the resolution or ordinance of which the company complains is directed only to the telephone system provided for in ordinance No. 135. After certain recitations and whereases it is

as follows: "Be it further resolved that said Dakota Central Telephone Company be, and it is hereby notified and requested forthwith on the 11th day of May, 1913, to remove from the streets, avenues, alleys and public grounds of the City of Mitchell, South Dakota, all of its poles, wires, cables, fixtures and apparatus of every kind and description used by it in the construction, maintenance and operation of its local telephone exchange or system in the City of Mitchell, South Dakota."

Whatever is necessary, therefore, for the maintenance and operation of the long distance system provided for in ordinance No. 180 is not intended to be disturbed. We must leave the adjustment, however, to the District Court.

Decree of the District Court reversed and the case remanded for further proceedings in conformity with this opinion.

CITY OF COVINGTON *v.* SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 225. Argued March 19, 20, 1918.—Decided April 15, 1918.

A grant of "all the right and authority" that a city "has the capacity to grant" to construct, hold and operate a street railroad on designated streets, without a hint of limitation as to time, is a grant in perpetuity if the city has authority to grant perpetually.

An ordinance entitled "an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington," providing for proposals and a contract to be made with the best bidder respecting specific routes, and declaring that "all contracts made under the provisions of this ordinance shall be for the term

and period of twenty-five years," *held* not to be addressed to the scope of future ordinances, and not to limit the term, otherwise perpetual, of a franchise for other routes granted by a later ordinance.

One street railroad company held a perpetual ordinance franchise, and another a limited one with but eight years to run with the right, however, at expiration to secure a new franchise or compensation for its property. An ordinance, entitled as granting the right of way to the first company over the streets held by the second, authorized the first to contract for the second's right and to "occupy and use" such streets "subject to the conditions, limitations and restrictions" contained in the ordinances regulating the first company's rights in the streets it already occupied, but, as a condition, obliged the first company to give up part of its line which would be but imperfectly supplied by the new rights even if they were perpetual. *Held*, that the ordinance granted a perpetual franchise to the first company, and was not merely a consent that it acquire the right of the second.

Where not otherwise construed by the state court, legislation vesting the streets in a city, and giving its authorities exclusive control over them and its council exclusive power to establish and regulate all sidewalks, streets, alleys, lanes, spaces and commons of the city, is to be taken as empowering the city to grant street railroad franchises in perpetuity. *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58.

A street railroad is one of the ordinary incidents of a city and with respect to the municipal granting power stands on a different footing from steam railroads habitually run over separate rights of way.

Affirmed.

THE case is stated in the opinion.

Mr. A. E. Stricklett for appellant.

Mr. Alfred C. Cassatt, with whom *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellee to restrain the City of Covington from carrying out an ordi-

nance of July 14, 1913, that provides for the grant of a twenty-year franchise for a street railway over certain streets to the best bidder. The plaintiff claims a right by grant and contract over the same streets, which will be interfered with, and sets up Article I, § 10, and the Fourteenth Amendment of the Constitution. The defendant says that the plaintiff's grant has expired, and that if it purports to be perpetual it was beyond the power of the city. These are the two propositions argued. The District Court granted the injunction as prayed and the city appealed.

We will consider first the scope of the ordinances and contract under which the plaintiff makes its claim. On January 21, 1870, Edward F. Abbott, S. J. Redgate and their associates were incorporated, with perpetual succession, as the Covington and Cincinnati Street Railway Company, with power to construct railways in the City of Covington along such streets as the council might grant the right of way to, and along such roads out of the city as the companies owning the roads might cede the right to use. The company was authorized to purchase and hold such routes and railway tracks as might be deemed necessary for its use, and to connect with and use the tracks of other railways in the vicinity upon equitable terms. Just before their incorporation, on December 13, 1869, an ordinance was passed by the city granting, according to the terms of a contract executed on December 23, 1869, to Abbott and Redgate, "their associates, successors and assigns," "all the right and authority that [the city had] the capacity to grant, to construct, hold and operate a street railroad upon and along" the streets named. The only provision for a termination of the rights conveyed was in case of a failure of the grantees to keep their covenants. On December 28, 1874, an ordinance was passed extending the time for completing the work under the Abbott contract,

renewing the terms of the same but somewhat changing the route, and on January 28, 1875, another authorized an extension to a suspension bridge across the Ohio. On May 1, 1875, Abbott and his associates conveyed all their rights under the foregoing ordinances and contract to the corporation that they had formed, and the title of the corporation was recognized by an ordinance of June 24, 1875. On January 25, 1876, Abbott and others were incorporated with perpetual succession as The South Covington and Cincinnati Street Railway Company, the appellee, with substantially the same powers that were granted to the Covington and Cincinnati Company, and on December 20, 1876, the last-named corporation conveyed its rights to the appellee. The latter has whatever rights were acquired by Abbott, as was recognized by an ordinance of October 13, 1881.

As there is no hint at any limitation of time in the grant to Abbott, and on the other hand the city grants all the right and authority that it has the capacity to grant, there can be no question that the words taken by themselves purport a grant in perpetuity more strongly than those held to have that effect in *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58. The fact chiefly relied upon to narrow their operation is found in the terms of "an ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington" passed on December 15, 1864, before the dealings with Abbott. By § 13 "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years." It is contended that this by implication governs later transactions. But there is little ground for even an argument upon the point. The ordinance is providing for proposals and a contract with the best bidder, concerning routes contemplated by a rival of the Covington and Cincinnati, the Covington Street Railway Company incorporated on February 9,

1864 (afterwards bought up by the appellee). The contracts referred to in § 13 are primarily at least contracts of those who should acquire the franchises offered, such as in fact were made. In no sense is the Abbott contract a contract under that ordinance. It was a contract under the ordinance of 1869, which established its substance and even its form. The ordinance of 1864 did not address itself to the construction or scope of future ordinances, but only of certain contracts of which Abbott's was not one. We regard the matter as too plain to be pursued into greater detail. This part of our decision covers all the grants to Abbott including the right to lay tracks to the suspension bridge.

There were extensions of the plaintiff's rights by acts of the legislature of March 13, and April 5, 1878, in general terms that there seems to be no reason for supposing more limited in time than the original grant. See § 3. The only part of this branch of the case needing further discussion concerns the rights acquired by the plaintiff through the purchase of its rival's, the Covington Street Railway's, lines. This company, under the ordinance of 1864 that we have mentioned got a franchise limited to twenty-five years, but with provisions that there should be a new bid after that time and that the successful bidder, if other than the Covington Street Railway Company, should purchase its property upon a valuation. It did not lose the value of that property by the ending of its right of use. On June 8, 1882, the plaintiff, already having a general authority by its charter, was authorized by "an ordinance granting the right of way over certain streets . . . to" the plaintiff, to contract with the Covington Street Railway Company for the right of way held by the latter and to occupy and use the streets specified in the contract of that road with the city, "subject to the conditions, limitations and restrictions contained in the ordinances regulating its [the plaintiff's] right to

the streets now occupied by the said South Covington and Cincinnati Street Railway Company." This grant was on condition that the plaintiff should remove the tracks by which it connected with the suspension bridge under the ordinance of January 28, 1875, and give up its rights to the same, which as we have said were rights in fee. It got other access to the bridge over the Covington Street Railway line, but we agree with the district judge that it is not to be supposed that it would give up its perpetual right for a franchise having eight years to run over a less convenient route, so far as this part of its purchase was concerned. We agree also that the language of the ordinance conveys more than a license to purchase what the vendor had. The title and the operative words import a grant and the reference to the ordinances regulating the plaintiff's right in the streets adopts as the measure these, not the contract with the selling road. The ordinance was followed by the contemplated contract in July, 1882. Some further grants need no special mention. We are of opinion that the plaintiff's right in this part of its system also is a right in fee.

The question of the power of the city to grant a perpetual franchise needs but few words. By statute the streets were "vested in the city" and the authorities of the city were given "exclusive control over the same" and in another section the council was given "exclusive power to establish and regulate . . . all sidewalks, streets, alleys, lanes, spaces and commons of the city." Acts 1849–1850, c. 237, §§ 2, 19, p. 239. No decision of the state court is brought to our attention that calls for any hesitation in following the authority of *Owensboro* v. *Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, and pronouncing the authority complete. *Wolfe* v. *Covington & Lexington Railroad*, 15 B. Monr. 404. A street railroad is one of the ordinary incidents of a city

street and stands on a different footing from the steam roads habitually run over separate rights of way. See also Act of March 13, 1878, c. 423, and Act of April 5, 1878, c. 813, §§ 1, 3.

Decree affirmed.

MR. JUSTICE CLARKE, dissenting.

I have so recently stated my reasons for not concurring in opinions which seemed to me, by inference and construction, to raise limited, into perpetual, grants of rights in city streets, that I shall not repeat them here (*Owensboro* v. *Owensboro Water Works Co.*, 243 U. S. 166, 174; *Northern Ohio Traction & Light Co.* v. *Ohio*, 245 U. S. 574), but shall confine myself to a brief statement of the facts and conclusions of law which lead me to dissent from the court's opinion in this case.

The opinion of the court begins with the grant to Abbott, et al., in December, 1869, but in my judgment that grant cannot be correctly interpreted without beginning five years earlier, in 1864, with an ordinance passed by the city, which is general in its terms and is described in the record of council as "an ordinance defining the obligations of any company or individual to whom privilege may be granted to use the streets of the city for street passenger railroad purposes." It is entitled, "An ordinance prescribing the terms and conditions of street passenger railroads within the City of Covington." This ordinance contained these provisions: "This ordinance shall continue and be in force from and after its passage. All contracts under the provisions of this ordinance shall be for the term and period of twenty-five years." And so far as the record shows it has never been repealed.

Pursuant to the terms of this general ordinance, a contract was entered into as of March 9, 1865, with the Covington Street Railway Company, giving it the right to

operate a street railway on designated streets, again "for a period of twenty-five years from its date."

More than four years later, on May 13, 1869, Abbott and others made an application to the council for a franchise and the company holding the prior grant, which was then operating a railway, protested against the making of a grant to Abbott, and warned the city that it claimed the right to operate on all its streets and that another grant could not lawfully be made.

But at the meeting at which this protest was filed, without any special authority from the legislature, this grant was made to Abbott. It is from the language of this grant that the court derives a perpetual franchise, and it reads:

"Be it ordained by the City Council of Covington that all the authority and right that the City of Covington has the capacity to, be and the same is hereby granted to E. F. Abbott [*et al.*] . . . to construct, hold and operate a street railroad," upon designated streets.

I cannot bring myself to think that this is the language men would use who were intending to grant perpetual rights in city streets, but rather it seems to be the cautious describing of what the councilmen thought a doubtful right under a doubtful remnant of authority, remaining after the grant to the other company which was threatening litigation if this further grant were made, and that they thought it subject to the limitation of twenty-five years in the general ordinance of 1864. And be it noted that this grant, made without special authority from the legislature, is dated December 13, 1869; that the Covington & Cincinnati Street Railway Company, the predecessor of the appellee, was not chartered for more than a year after the date of this grant to Abbott, from which all the rights of the appellee are claimed to flow; and that it did not acquire the grant

until 1875 in which year the first construction work was done under it.

Some twenty years after the grant to Abbott the City of Covington granted, this time to the Cincinnati, Covington & Rosedale Company, a franchise which was expressly limited to fifty years and which, recognizing that the general ordinance of December 15, 1864, was still effective, required that the grantee should conform to all the requirements of that ordinance "except in so far as the same has been repealed."

In the street railroad case of *Louisville City Ry. Co.* v. *City of Louisville*, 8 Bush, 415, the Court of Appeals of Kentucky, construing the charter of the City of Louisville, granting jurisdiction over streets, in scope, not less than that granted by the Covington charter, declared: "Under the general legislative power of the municipal government to control and regulate the use of the streets of the city, it could not grant to any person or corporation the right to lay down a railway in a street. . . . The right of the general council to contract with the railway company *grows out of the special acts of the legislature* heretofore quoted."

Whether this statement was necessary to the decision of the case then under consideration or not, in the following year it was paraphrased and adopted in a *Covington Street Railway Co.* case [*Covington Street Ry. Co.* v. *Covington*] 9 Bush, 127, and, almost twenty years after that, it was again approved in a *Covington* case, [*Bateman* v. *Covington*] 90 Kentucky, 390.

Thus, during the entire period covered by the grants here involved, it was the law of the State, as its highest court understood and announced it, that the City of Covington did not have, under its charter, power to make a street railway grant, *without special authority so to do from the legislature.*

That this was also the opinion of the legislature of the

State and of that part of the bar of the State concerned with the grants here involved is conclusively shown by the fact that in the charter of every one of the three street railway companies concerned herein there is *a special grant of power to the City of Covington* to make the contemplated contract for the use of its streets for street railway purposes.

This obscurely worded grant, thus made to Abbott without special legislative authority, is not helped out by subsequent recognition by the city, for we find the parties, almost from the beginning of its term, dealing with each other constantly at arm's length, the city claiming that the grant was, at most, limited to twenty-five years, and the Railway Company claiming it to be perpetual.

For instance, as early as 1887, when the right to use electric power was granted, a typical provision was inserted in the ordinance, accepted in writing by the company, "that nothing in this ordinance shall be construed to, nor shall it give to, said railway any further or longer time than it now has to operate its lines."

Again, in 1892, for a reduction of fare and other considerations the city agrees "for the period of twenty years after the date of the acceptance of this ordinance" not to offer for sale any of the rights or franchises of the appellee in the said streets; and it was not until after the expiration of this period that the proposition to grant a new franchise was made, which the decision of the court permanently enjoins.

This is sufficient of detail to indicate why I am of opinion that the meager and equivocal grant of 1869 should not be regarded as helped out by the subsequent dealings of the assignees of it with the city.

Under the circumstances thus presented, with limited franchises granted before and after this grant to individuals, but never one unlimited in terms, with the city contending always that this franchise was for twenty-

five years only, and with the courts, legislature and bar of the State united in thinking that there was no power in the municipality to make even a limited street railroad grant without special legislative warrant, I cannot bring myself to consent to construe, as the court does, an obscurely worded clause of a single sentence, found in a grant to individuals, of the right to construct an insignificant horse railroad, which the son of the grantee in an affidavit alleges required an expenditure of only $48,000, so as to impose upon the municipality "the unspeakable burden" of a perpetual franchise to operate street railroads in its streets.

Fully realizing the futility, for the present, of dissenting from what seems to me to be an unfortunate extension of the doctrine of the *Owensboro Case*, 230 U. S. 58, I deem it my duty to record my dissent, with the hope for a return to the sound, but now seemingly neglected, doctrine of *Blair* v. *Chicago*, 201 U. S. 400, 463, declaring that a corporation which would successfully assert a private right in a public street must come prepared to show that it has been conferred "*in plain terms*," "*in express terms*" and that any ambiguity in the terms of the grant must be resolved in favor of the public and against the corporation "*which can claim nothing which is not clearly given.*" The reason given by the court for this rule is, that "grants of this character are usually prepared by those interested in them," and that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act." This is declared to be "sound doctrine which should be vigilantly observed and enforced."

Believing that the application of this wise rule to the decree before us must result in its reversal, I dissent from the opinion of the court.

MR. JUSTICE BRANDEIS concurs in this dissent.

INTERNATIONAL & GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* ANDERSON COUNTY ET AL.

ERROR TO THE COURT OF CIVIL APPEALS, SIXTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 243. Argued March 25, 26, 1918.—Decided April 15, 1918.

With respect to a railroad within its territory, a state court has jurisdiction to decide whether the owner is under a public duty to maintain the offices and shops at a particular place, even though it were assumed, as a rule of decision, that a foreclosure and confirmed sale in a federal court conferred immunity from the obligation which that court alone could withdraw.

Foreclosure and sale of a railroad in a federal court will not relieve the purchaser from a contractual or statutory duty, which rested on its predecessors under the state law, to maintain offices and shops at a particular place, if the state law holds the obligation indelible by foreclosure.

The prohibition against removal of offices and shops located by contract within a county in consideration of county bond aid extends, under the Texas Office-Shops Act of 1889, to the successor by mortgage foreclosure of the contracting railroad.

In its provision that offices and shops shall be at the place named in the charter, and if no certain place is there named then at such place as the company shall have contracted to locate them, etc., this statute does not intend that a valid contract for location may be evaded by a purchasing company by naming another place in its charter filed under a general law.

Semble, that a contract to maintain the offices and shops of a railroad at a particular place survives mortgage foreclosure and sale of the railroad where the purchaser succeeds to the mortgagor's franchise to be a corporation.

Semble, that, generally speaking, a state legislature, dealing with a local railroad corporation, has power to fix the place of its domicile and principal offices.

A corporation, organized under general laws expressly declaring that charters thereunder should be subject to provisions and limitations imposed by law, while another act prohibited changing locations of railroad offices and shops in certain cases, purchased a railroad under

proceedings foreclosing a mortgage. *Held*, that whether or not the prohibition would have been constitutional as applied to the company's predecessors, it was a condition of its incorporation of which it could not complain.

In so far as it depends upon the testimony, the verdict of a jury, upon an issue requested by the complaining party, finding that a state regulation as to location of railway offices and shops does not burden interstate commerce, will be accepted.

Held, that the burden, if any, in this case, upon interstate commerce, due to a state law forbidding change of location of a railway's offices and shops, is indirect, and that the state power was not exceeded.

A decree of injunction which properly will be operative until the law is changed may properly be expressed as perpetual.

174 S. W. Rep. 305, affirmed.

THE case is stated in the opinion.

Mr. H. M. Garwood and *Mr. Samuel B. Dabney*, with whom *Mr. F. A. Williams*, *Mr. N. A. Stedman* and *Mr. Frank Andrews* were on the briefs, for plaintiffs in error:

The Circuit Court for the Northern District of Texas had exclusive jurisdiction, reserved in the foreclosure decree of May, 1910, under which the properties were sold out, and the state court had no jurisdiction.

This litigation is in conflict with the right, title, privileges and immunities protected by the decrees of the Circuit Court for the Western District of Texas entered on foreclosures of four mortgages in 1879, and by the decree of the Circuit Court for the Northern District of Texas, entered on foreclosure in May, 1910.

The state court had no power in this collateral proceeding to declare the three decrees of 1879 not to be *bona fide*, and to be fraudulent.

The mortgage of the International & Great Northern Railroad Company of 1881 was foreclosed in 1910, and included all charter rights, and on foreclosure sale all the properties were bought in and transferred to the International & Great Northern Railway Company, chartered

in 1911. Therefore, the Office-Shops Act of 1889, here relied on as giving security for the alleged contracts of 1872–1875, could not secure and enlarge those contracts without violating the obligation of the mortgage contract of 1881; which it is submitted has been violated by the decree here under review, contrary to that provision of the Constitution prohibiting any State from passing a law violating the obligation of a contract.

The Office-Shops Act of 1889, as construed and herein enforced, conflicts with the contract clause also because the purely personal alleged contracts of 1872–1875 sued on are extended and secured, and their obligations changed, by that statute.

The Office-Shops Act, as construed and enforced herein, cannot be justified as a legitimate exercise of the police power of the State.

Under the law existing in 1879, and anterior to that time, and at the time of the foreclosure of the mortgages in 1879 and the selling out of the property thereunder, not only tangibles were sold, but also there were mortgaged, foreclosed and sold all of the charters of the International & Great Northern Railroad Company, whereby the alleged contracts herein sued on alleged to have been created in 1872–1875 (then personal, and personal at the time of the foreclosure of 1879), were by the foreclosures and sales eliminated as against the new railroad, and could not by the Act of 1889 be extended and secured against the properties of the railroad without violation of the obligations of the foreclosed mortgage contracts, and without denial of the rights, titles, privileges and immunities secured by the decrees of the United States court, and after the lapse of 35 years those decrees could not, in the state court, be declared fraudulent, even if there had been evidence of fraud.

The Act of 1889, as herein construed, to extend and to secure as extended the alleged contracts of 1872–1875,

by a perpetual lien and servitude, deprives plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment; and in attempting to compel plaintiff in error (an interstate carrier) to forever maintain its machine shops, roundhouses and general offices at Palestine, places a burden upon interstate commerce, in violation of par. 4, § 8, Art. 1, of the Constitution.

Mr. F. D. McKenney and *Mr. Thomas B. Greenwood*, with whom *Mr. A. G. Greenwood*, *Mr. W. C. Campbell* and *Mr. Jno. C. Box* were on the briefs, for defendants in error:

This suit was not within any reservations of exclusive jurisdiction in the decree of foreclosure, because it involved merely the enforcement of a continuing statutory duty of plaintiff in error.

The Circuit Court for the Northern District of Texas completely discharged the railroad and franchises of the sold-out company from its possession, custody and control, actual and constructive, prior to the institution of this suit.

The Office-Shops Act came within the police power of the State as a valid regulation, for the promotion of the public interest, of franchises granted by the State for the operation of railroads, and it must be obeyed by plaintiff in error both as the purchaser of a railroad and its franchises, under foreclosure of a mortgage antedating the statute, and as a corporation organized under a law which expressly imposed upon it obedience to the statute.

The Court of Civil Appeals having determined as a pure question of fact, not open to review here, that the properties and franchises of the International & Great Northern Railroad Company were sold in 1879 to mere trustees for the debtor corporation, such sale could not discharge the personal obligation of the locative contracts, and in no event could such sale affect the statutory pro-

hibition against changing the general offices and shops from Palestine.

The statute is not void as a direct regulation of interstate commerce.

The record presents no substantial federal question for decision by this court, and the concurring judgments of the state courts are rested upon nonfederal grounds broad enough to sustain them. The entire matter is one of purely local concern, dependent for solution upon the construction and application of state laws.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the defendants in error to prevent the Railroad Company, plaintiff in error, from moving its machine shops, roundhouses, and general offices from the City of Palestine and from maintaining any of them elsewhere. An injunction was issued as prayed; the judgment was affirmed by the Court of Civil Appeals, 174 S. W. Rep. 305, in accordance with intimations of the Supreme Court of Texas at an earlier stage, 106 Texas, 60, and an application to the latter Court for a writ of error was refused. The case is brought here upon voluminous assignments of error which may be summed up in the propositions that the state court was without jurisdiction because of certain foreclosures in the Courts of the United States, that the judgment disregarded rights secured by the decrees of those Courts, and that it gave effect to a statute which as applied burdened interstate commerce, impaired the obligation of contracts, etc., and was contrary to Article I, §§ 8 and 10, and to the Fourteenth Amendment of the Constitution of the United States.

The facts begin with the predecessors of the plaintiffs in error. The Houston and Great Northern Railroad Company, a local road, was chartered by a special Act

on October 26, 1866. About March 15, 1872, it contracted with the citizens of Palestine in the County of Anderson in consideration of the issue of bonds by the county to maintain its general offices, machine shops and roundhouses at that place. The International Railroad Company was chartered in like manner on August 5, 1870. In 1872 the two companies agreed to consolidate and this agreement was ratified by the stockholders of each in 1873. A special Act of April 24, 1874, authorized the consolidated company, known as the International and Great Northern Railroad Company, to issue bonds secured by mortgage and provided that all acts theretofore done in the name of either of the companies should be of the same binding effect upon the new one that they were upon the old. In 1875 the new company in consideration of the erection of houses for its employees renewed the contract of the Houston & Great Northern and at about the same time it resolved that its general offices should be removed to Palestine. We see no reason for reopening the findings below that the alleged contracts were made. The offices were removed and there they remained, subject to some immaterial interruption, until 1911. The machine shops and roundhouses are still there. Each of the two constituent companies had executed mortgages before the date of the original agreement of the Houston & Great Northern and each executed another before the contract of the consolidated company in 1875. These mortgages were all foreclosed in 1879 and the property conveyed to a corporation, still called the International & Great Northern Railroad Company, by a deed that conveyed all the franchises and chartered powers of the original roads. The foreclosure is one fact relied upon for the defence.

The purchasing company in its turn executed mortgages, one of which, including, like the earlier ones that we have mentioned, the franchise to be a corporation,

dated in 1881, is the source of the plaintiff in error's title, by a foreclosure in 1910–1911. Before this last foreclosure took place two statutes were enacted in Texas that are important. The first, known as the Office-Shops Act, approved March 27, 1889, c. 106; Rev. Civil Stats. 1911, § 6423, provided that every railroad company chartered by the State or owning or operating a line within the State should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that if the offices, shops or roundhouses were located on the line of a railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; "and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization." A violation of the act entails forfeiture of the charter, with a penalty of $5,000 a day for every day of violation. Rev. Stats., § 6425. An act approved two days later, March 29, 1889, with provisos that no rights should be acquired inconsistent with the present constitution, that the main track once constructed and operated should not be removed, &c., authorized purchasers of sold-out railroads to form a new corporation, whereas previously the purchaser had continued the franchises of the old under the original grant. A law of September 1, 1910, c. 4, further emphasized the change of policy by excluding a succession to the old charter unless coupled with an acceptance of certain liabilities, and providing that the charter should pass subject to the provisions and limitations imposed and to be imposed by law. Rev. Stats., § 6625.

The mortgage of 1881 last mentioned was foreclosed by proceedings in the Circuit Court of the United States. A decree of May 10, 1910, while reserving jurisdiction of the property, ordered a sale, which, after postponements, took place on June 13, 1911, and was confirmed the next day. On September 25, 1911, the railroad and franchises were finally discharged from the possession and control of the receiver and the Court. Before that date the plaintiff in error was incorporated under the Act of 1889 and general laws and took the conveyances under the foreclosure decree. Within the time allowed it had filed in Court a repudiation of any agreement on the part of any of its predecessors to maintain their offices and shops at Palestine, and later gave notice to that effect to officials of Anderson County and Palestine. The articles of incorporation fixed the place for the general offices as Houston.

The railway company denies the jurisdiction of the state court and sets up that the court of the last foreclosure is the only proper forum. But a decree of foreclosure does not render the purchaser and property foreclosed sacrosanct. The Circuit Court had finished the case and had given up possession and control before this suit was brought. *Shields* v. *Coleman*, 157 U. S. 168, 178, 179. *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 55. Even if it were true that the foreclosure sale and order carried an immunity from the present demand that the railway was entitled to set up, in the absence of action on the part of the Court of the United States, it would not take away the power of the state court to decide as to the existence of an alleged public duty on the part of a railroad within the territory where the court sat. *Ricaud* v. *American Metal Co.*, *ante*, 304.

But the foreclosures did not have the supposed effect. They no more removed all human restrictions than they excluded the authority of ordinary courts. Suppose

that a special act incorporating the mortgagor had provided in terms evidently intended to reach beyond foreclosure that the general offices were to remain forever at Palestine, it hardly would be argued, and certainly would not be argued here or in Texas with success, that the requirement could be touched by a decree. But if the law made that requirement, it hardly matters whether the restriction was imposed by charter or otherwise or whether the remote reason for it was a contract or a general notion of public policy. The state courts hold that when the law on any ground fixes the place of the offices and shops the obligation is indelible by foreclosure. We see no reason why their decision should not prevail.

It is contended that the Office-Shops Act of 1889 does not touch the plaintiff in error by its terms and that if it be construed to do so it is unconstitutional. On the construction of the act it seems to us that there can be no doubt. It is true that the provision requiring the general offices to be maintained at the place where the railroad had contracted to keep them is conditioned on no place being named in the charter, but of course this does not mean that articles framed under a general law can get rid of contracts that otherwise would bind, and in our opinion it is equally plain that no distinction was intended between the contract by the present road and one by its predecessor, if the office and shops "are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made." "Then," the statute says, "said location shall not be changed." The construction of the act by the state court is beyond criticism upon this point.

It is said that the act so construed would infringe the constitutional rights of the parties to the mortgage of 1881, which the plaintiff in error took by foreclosure.

But it will be remembered that the mortgagor under the law then in force merely had succeeded to the original contractors, freed from their unsecured debts, no doubt, but, it well might be held, not freed from the obligation in question. Also it was found by the Courts below that the sale under which the mortgagor took in 1879 was not a *bona fide* sale, and so was not a sale that put the purchaser in a position other than that of mortgagor. Apart from these considerations we should be slow to say that it was not within the power of a state legislature dealing with a corporation of the State to fix the place of its domicile and principal offices, in the absence of other facts than those appearing in this case. But furthermore when the Office-Shops Act was on the statute book the plaintiff in error took out a charter under general laws that expressly subjected it to the limitations imposed by law. It is said that this does not make the plaintiff in error adopt an otherwise unconstitutional statute. But even if, contrary to what we have intimated, the act could not otherwise have affected those particular corporations, it was a law upon the statute books and was far from a mere nullity, and if it was made a condition of incorporation that this restriction should be accepted, the plaintiff in error cannot complain. *Interstate Consolidated Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79. We agree with the state courts that the condition was imposed.

The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon

the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers. The burden if any is indirect. Some complaint is made of the form of the judgment, as purporting to be perpetual. But the word perpetual adds nothing to a requirement that the office and shops should be maintained in Palestine. The requirement is perpetual until the law is changed. When and how it may be changed is not before us now. Other objections are urged and other details are adverted to in the very lengthy printed arguments, besides those with which we have dealt, but we deem it unnecessary to go farther. Upon the whole case we are of opinion that the judgment below should be affirmed.

Judgment affirmed.

GREAT NORTHERN RAILWAY COMPANY ET AL. *v.* STATE OF MINNESOTA EX REL. VILLAGE OF CLARA CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 185. Submitted March 12, 1918.—Decided April 15, 1918.

Railroad companies may be required, under the state police power, at their own expense, to make streets and highways crossed by their tracks reasonably safe and convenient for public use.

Upon this principle, where a village street with business houses on both sides was intersected by a railroad right of way of which the central portion only was occupied by roadbed and tracks and was sufficiently planked for crossing purposes, *held*, that a requirement

(under Minnesota Laws, 1913, c. 78, § 1) that a sidewalk be built to extend the street sidewalk across the right of way on either side of the planking, along one side of the street where people must frequently cross, could not be regarded as an arbitrary or unreasonable requirement depriving of due process or denying the equal protection of the laws.

132 Minnesota, 474, affirmed.

THE case is stated in the opinion.

Mr. E. C. Lindley, *Mr. M. L. Countryman* and *Mr. Thomas R. Benton* for plaintiffs in error.

Mr. C. A. Fosnes and *Mr. Alfred K. Fosnes* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought to compel the railroad companies to build a sidewalk on the south side of Bunde Street in the village of Clara City, Minnesota, where the right of way of the railroad companies crosses that street. The right of way of the companies is of the width of 300 feet at the place where Bunde Street crosses the same. At or near the center of this right of way the companies have constructed three railroad tracks. There are business houses upon both sides of the right of way, and it becomes necessary for people to cross the same frequently.

The case was decided in the lower court in Minnesota upon demurrer to the petition in mandamus, and the record contains this statement:

"For the purpose of the demurrer it was admitted by relator that that part of the street in question which is occupied by the roadbed or tracks of the respondents was and is properly, securely and sufficiently planked the full width of the street, such planking extending

the full length of the ties and between the tracks as in that particular required by statute; that the sole object and purpose sought to be attained in and by these proceedings is to compel the respondents to construct a sidewalk on one side of the street as it is located across the entire right of way, so that the sidewalk will connect with the said planking in either direction, but not so as to include in such construction the building of any sidewalk or crosswalk along that part of the street now occupied by said roadbed or tracks, which part is already sufficiently and securely planked for crossing purposes."

The General Laws of Minnesota contain a provision requiring the planking of railroad crossings where the same cross a public street. Section 4256 of the General Laws of Minnesota. By amendment of 1913 the following provision was added:

"And a suitable sidewalk shall be constructed by said company to connect with and correspond to said walks constructed and installed by the municipality or by owners of abutting property, but cement or concrete construction shall not be required in track space actually occupied by the railroad ties if some substantial and suitable sidewalk material is used in lieu thereof." Laws of Minnesota 1913, c. 78, § 1.

The lower court in Minnesota dismissed the petition, which judgment was reversed by the Supreme Court of Minnesota, and the railroad company was required to construct the sidewalk at its own expense. 130 Minnesota, 480. The court held that the statute was a reasonable exercise of the police power of the State. The contention here made is that the statute as thus enforced denies to the companies due process of law and the equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution.

It is too well settled by former decisions of this court to require extended discussion here that railroad com-

panies may be required by the States in the exercise of the police power to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and this at their own expense. Such companies accept their franchises from the State subject to their duties to conform to regulations, not of an arbitrary nature, as to the opening and use of the public streets for the purpose of promoting the public safety and convenience. This principle was applied by this court in *Cincinnati, Indianapolis & Western Ry. Co.* v. *Connersville*, 218 U. S. 336, wherein the railroad, because of the extension of a street through an embankment upon which the railroad was built, was required to construct at its own expense a bridge across the street. In *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, it was held that a municipality of the State of Minnesota might require a railroad company to repair a viaduct constructed by the city after the opening of the railroad notwithstanding a contract relieving the railroad from making repairs thereon for a term of years. That the police power of the State was a continuing one, and could not be contracted away, and that uncompensated obedience to laws, passed in its exercise, did not contravene the Federal Constitution. This case was followed with approval in *St. Paul, Minneapolis & Manitoba Ry. Co.* v. *Minnesota*, 214 U. S. 497. In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis*, 232 U. S. 430, this court affirmed a judgment of the Supreme Court of Minnesota requiring a railroad company to build at its own expense a bridge required in order to permit a municipality in that State to construct a canal connecting two lakes within the limits of a public park. In the opinion in that case previous decisions in this court are collected and reviewed.

The Supreme Court of Minnesota in the instant case held that the railroad companies might be required to

construct a sidewalk upon the right of way on both sides of the planked crossing. In the opinion of the court the sidewalk, leading to the crossing, tended to promote the safety and convenience of the public, and, after discussing the well-established authority of the State to require planking at crossings, as to the additional requirement to build the connecting sidewalk, said:

"There can be no controlling difference between the requirement of sidewalk and of planking. Planking is, to be sure, more to prevent persons in vehicles from injury, or the vehicles or teams from damage, by being stalled on the crossing. But, where a crossing is much traveled, safety, to say nothing of convenience, may require a separate space, like a sidewalk, reserved for pedestrians. There is a peculiar peril to travelers on foot, where many vehicles pass and the attention of the drivers is diverted to looking out for trains liable to use the crossing. Again, unless a well-defined walk be provided, there is danger of pedestrians crossing the tracks at places unexpected to those in charge of trains or cars, not to mention the inconvenience where mud and impassable conditions compel those on foot to deviate from the street proper.

"It is said defendant, if obligated to lay a sidewalk across its right of way, might likewise be required to construct sidewalks along such right of way where it borders a highway or street. The sufficient answer is that the statute does not call for anything of the kind.

"The contention is also that defendant has so much larger right of way than it needs or occupies for its three tracks that for the greater distance the sidewalk, as a safety provision, is out of place. It is to be assumed that the right of way is such only as is needed for and devoted to railway purposes, and such as is rightfully exempt from taxes and assessments because of the payment of the gross earnings tax. Within its right of way defendant

may at any time place additional tracks, or change the location of those it maintains, and, for that reason, it also seems proper that the safety of the passage for the traveler for the whole distance should be placed upon the railroad company. The statute merely prescribes that it shall maintain a sidewalk over its legitimate right of way to correspond and connect with the walk maintained under the supervision of the municipality, so as to afford the pedestrians a reasonably safe and convenient crossing."

This court considers a case of this nature in the light of the principle that the State is primarily the judge of regulations required in the interest of the public safety and welfare. Such statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest. We are not prepared to say that this statute is of that character, and the judgment of the Supreme Court of Minnesota is

Affirmed.

BOSTON & MAINE RAILROAD *v.* PIPER.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 208. Submitted March 14, 1918.—Decided April 15, 1918.

A stipulation in the Uniform Live Stock Contract, filed by the carrier with the Interstate Commerce Commission, limiting the carrier's liability for unusual delay and detention caused by its own negligence to the amount actually expended by the shipper in the purchase of food and water for the stock while so detained, is illegal, and is not binding on a shipper who executed the contract and shipped under it for the corresponding reduced tariff rate.

Such a stipulation contravenes the principle that the carrier may not

exonerate itself from losses caused by its own negligence, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced rate.

Illegal conditions and limitations in a carrier's bill of lading do not gain validity from the filing of a form containing them with the Interstate Commerce Commission.

90 Vermont, 176, affirmed.

THE case is stated in the opinion.

Mr. E. W. Lawrence for plaintiff in error:

The words "unusual delay or detention of said live stock caused by the negligence of said carrier," define a situation for which legal liability will exist. What follows is an agreement as to the basis of computing damages, once the liability has been fixed. Until the liability is determined the damage clause has no application. Its terms have no relation to a defense to liability. Nor is it in legal effect a stipulation against negligence. It is of course true that the substitution of any arbitrary measure of damages in place of the actual amount may alter the ultimate financial responsibility for negligence, but it cannot be said that such a measure is in itself a legal defense against liability. *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319.

The clause in question is analogous to a released valuation clause and under the decisions is therefore lawful. It is now well established law, that where the shipper has a choice between two rates, the higher of which imposes common-law liability, the carrier may under the lower rate establish by tariff provision a limitation upon the amount of damages recoverable. It has been expressly held that such a limitation or agreed valuation is not a stipulation against liability for negligence.

The reasoning in the decisions seems to be that, where the shipper has the option of shipping at a higher rate, subject to the carrier's common-law liability, there is no

principle of public policy or statute which precludes the carrier from setting a limit on the amount of damage recoverable when the shipper elects to avail himself of a lower rate. The carrier's risk has a direct relation to the rate; and the publication of a lower rate, acceptance of which is optional with the shipper, entitles the carrier to stipulate for a lesser risk. The clause under consideration in this case is in every way analogous. In claims for loss or damage the total loss to the shipper is the actual value of the portion of the shipment destroyed or injured. However, he recovers not that value but the released valuation to which he has agreed. In claims for delay the total loss to the shipper is the extra expense of caring for his stock, plus any loss which he may suffer through market fluctuation. Under the clause in question he recovers not the total loss, but an amount to which he has agreed, namely his actual expenditure. In a claim for loss or damage the released valuation is an arbitrary sum, bearing a relation to the average value of such shipments. In a claim for delay the clause in question is a varying amount bearing a relation both to the extent of the delay and the average loss attributable thereto. If the shipper desires more complete protection he may pay the higher rate and obtain it. Both classes of limitation are adjustments of the carrier's risk to the rate charged. Such adjustments are sanctioned by the law. *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97.

It has been held "that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property." It has also been held that if the limitations were unreasonable, it is for the Interstate Commerce Commission to correct them upon proper proceedings. *Pierce Co.* v. *Wells, Fargo & Co.*, *supra*.

Mr. Marvelle C. Weber for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by Piper against the Boston & Maine Railroad to recover damages for loss occasioned by delay in delivering cattle as a result of the company's negligence. The plaintiff recovered damages and the judgment was affirmed by the Supreme Court of Vermont. 90 Vermont, 176.

The plaintiff shipped the cattle upon paying the reduced rate for shipment thereof under the Uniform Live-stock Agreement containing among other things, the following:

"The same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the shippers as just and reasonable. . . . That in the event of any unusual delay or detention of said live-stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for said stock, while so detained. . . . And E. G. Piper does hereby acknowledge that he had the option of shipping the above described live-stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers, of the said live-stock upon their respective roads and lines, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned."

The tariffs in effect at the time the shipment moved

provided for a rate of $42 when the Uniform Live-stock Agreement was signed and that:

"Live stock will be taken at the reduced rates fixed in the tariff only when a Uniform Live Stock Contract is executed by the station agent and the consignor, and when the release on the back of said contract is executed by man or men who are to accompany said live stock. If consignor refuses to execute a Uniform Live Stock Contract, the live stock will be charged ten (10) per cent. higher than the reduced rates specified herein, provided that in no case shall such higher charge be less than one (1) per cent. per one hundred pounds."

The company's tariffs were duly filed with the Interstate Commerce Commission and contained a copy of the Uniform Live-stock Contract as above set forth.

Interstate shipments of the character here in controversy made upon bills of lading, and under tariffs filed with the Interstate Commerce Commission, have been the subject of frequent consideration in this court. The binding character of the stipulations of the bill of lading, and of the rates as fixed in the filed tariffs, have been recognized and enforced. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, and previous cases in this court therein cited.

The Carmack Amendment requires the initial carrier to issue a bill of lading, and carriers are obliged to carry the articles shipped at the rates fixed in the published tariffs. Many decisions of this court have held that the carrier may offer to the shipper and the shipper may be bound by a contract which limits recovery to a valuation declared by the shipper in consideration of the reduced rate for the carriage of the freight. This rule was stated in an early case arising after the passage of the Carmack Amendment, *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509, 510, and has been frequently reiterated since.

In the cases in which the recovery for the lesser valu-

ation has been affirmed, the shipper was offered an opportunity to recover a greater sum than the declared value upon paying a higher rate to the carrier. The shipper was offered alternative recoveries based upon different valuations upon the payment of different rates, and was held bound by the one chosen. Such contracts of shipment this court has held not to be in contravention of the settled principles of the common law preventing a carrier from contracting against liability for losses resulting from its own negligence, and are lawful limitations upon the amount of recovery binding upon the shipper upon principles of estoppel. *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331; followed and approved since the passage of the Carmack Amendment in *Adams Express Co.* v. *Croninger*, 226 U. S. *supra*, and see *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 657; *Chicago, Rock Island & Pacific Ry. Co.* v. *Cramer*, 232 U. S. 490; *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173. Furthermore it has been held that a low valuation will not prevent the application of the rule making the agreement binding upon the shipper. *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 285.

While the rule of the lesser recovery based upon lesser rates, when the shipper has been given the option of higher recovery upon paying a higher rate, has been held binding upon the shipper so long as the published tariff remains in force, this court has not held a bill of lading containing a limitation against liability for loss caused by the carrier's negligence, such as is here involved, to be conclusive of the shipper's right to recover. In the previous decisions of this court upon the subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves

to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service.

In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

We find no error in the judgment of the Supreme Court of Vermont, and the same is

Affirmed.

SALT LAKE INVESTMENT COMPANY *v.* OREGON SHORT LINE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 29. Argued March 8, 1918.—Decided April 15, 1918.

Lands within the limits of an incorporated city, whether actually occupied or sought to be entered as a townsite or not, were excluded from acquisition under the Pre-emption Act.

An attempted pre-emption settlement on such land, and filing of declaratory statement in the local land office, do not affect the disposing power of Congress or operate to exclude the tract from subsequent grant of right of way "through the public lands," containing no excepting clause.

The Act of March 3, 1877, c. 113, 19 Stat. 392, did not confirm or provide for confirming such absolutely void pre-emption claims so as to disturb rights vested before the date of the act under a railroad right of way grant.

The act granting a right of way "through the public lands" to the Utah Central Railroad Company (c. 2, 16 Stat. 395,) applied to public lands over which the road had been constructed within the corporate limits of Salt Lake City but which never were occupied as a townsite or attempted to be entered as such. The Townsite Act is not inconsistent with this conclusion.

46 Utah, 203, affirmed.

THE case is stated in the opinion.

Mr. W. H. King, with whom *Mr. M. E. Wilson* and *Mr. E. A. Walton* were on the briefs, for plaintiff in error.

Mr. Henry W. Clark, with whom *Mr. George H. Smith* and *Mr. H. B. Thompson* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

A small parcel of land in Utah is here the subject of conflicting claims—one under a patent to Malcolm Mac-

duff issued under the pre-emption act, c. 16, 5 Stat. 453, and the other under an act, c. 2, 16 Stat. 395, granting a right of way "through the public lands" to the Utah Central Railroad Company. The court below sustained the latter claim, 46 Utah, 203, and the case is here on a writ of error allowed before the Act of September 6, 1916, c. 448, 39 Stat. 726, became effective.

Macduff's pre-emption claim was initiated by settlement June 10, 1869; his declaratory statement was filed in the local land office July 21 of that year; he paid the purchase price and secured an entry January 19, 1871, and the patent was issued June 6, 1871.

The right of way was granted December 15, 1870. At that time the railroad was completed and in operation for its full length. Cong. Globe, 41st Cong., 2d sess., 4512, 5635; *Moon* v. *Salt Lake County*, 27 Utah, 435, 442. It was constructed late in 1869 or early in 1870, after Macduff filed his declaratory statement and before he paid the purchase price or secured his entry.

Continuously after 1860 the tract sought to be pre-empted was within the corporate limits of Salt Lake City, as defined by a public statute, but was never actually occupied as a town site nor attempted to be entered as such. The parcel in controversy is within that tract, is also within the exterior lines of the right of way, and is occupied and used for right of way purposes.

The plaintiff in error is the successor in interest and title of Macduff and the defendent in error is the like successor of the Utah Central Railroad Company.

The pre-emption act, § 10, excluded from acquisition thereunder all lands "within the limits of any incorporated town." Thus the land which Macduff sought to pre-empt was not subject to pre-emption, and could no more be entered or acquired in that way than if it were in an Indian or military reservation. See *Wilcox* v. *Jackson*, 13 Pet. 498, 511. That it was not actually occupied as a

town site, nor sought to be entered as such, is immaterial. As Mr. Justice Miller pointed out in *Root* v. *Shields*, 20 Fed. Cas. 1160, 1166, Congress did not confine the exclusion to such lands as were so occupied, or such as were subject to town site entry, but "deemed the short way the best way,—to exclude them all from the operation of the act by a general rule." In that case the learned justice held a pre-emption entry of land within the corporate limits of Omaha "illegal and void," and said in that connection: "Again, the defect in the title was a legal defect; it was a radical defect. It was as if no entry had ever been made. By it Shields did not take even an equity. After he had gone through the process of making the entry, after he received the patent certificate, Shields had no more right, or title, or interest in the land than he had before. And as he had none, he could convey no interest in the land. By the deed which he made, and by the successive deeds which they received, his grantees took no more than he had, which was nothing at all."

In the case of *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the pre-emption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that "when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a

patent, transfer no title, and may be challenged in an action at law."

Applying these views, we think Macduff's settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

It is said that by the Act of March 3, 1877, c. 113, 19 Stat. 392, Congress confirmed or provided for the confirmation of pre-emption claims such as this. Assuming, without so deciding, that the act is susceptible of this interpretation, we think it does not disturb rights which were conferred and became vested under the right of way act more than six years before.

It seems also to be thought that the town site law in some way prevented the right of way act from reaching public land within the city limits, but on examining both statutes we are persuaded there is no basis for so thinking. Certainly it was not intended that the right of way should stop at the city limits, and, as the town site law interposed no obstacle, we think the right of way act was intended to and did apply to the public land lying inside those limits over which the railroad had been constructed.

Judgment affirmed.

CUDAHY PACKING COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 32. Argued April 26, 1917.—Decided April 15, 1918.

In so far as the property, tangible and intangible, constituting a freight car line, is regularly and habitually used or employed in a State, it is within the taxing power of that State although chiefly devoted or applied to interstate transportation, and may be taxed at its real value as part of a going concern.

In determining whether a state tax is to be viewed as a tax on property measured by earnings or a tax on earnings, the view of the state court and legislature, though not conclusive, will not be rejected by this court unless ill founded.

Under a law of Minnesota, part of a general system applied to railroads, telephone lines, etc., a company owning freight cars which it furnished to railroads for a fixed compensation per mile of travel and which were employed by the railroads within and without the State in hauling both interstate and intrastate commerce, was taxed at a stated per cent. of its gross earnings from the mileage within the State, in lieu of other taxes on the property so engaged, the tax being treated by the state court and legislature as a property tax, and not being in excess of what would be legitimate as an ordinary tax on such property, tangible and intangible, taken at its real value as part of a going concern. *Held*, that the tax was a property tax, not a tax on gross earnings burdening interstate commerce, and was not distinguishable from the tax sustained in *United States Express Co.* v. *Minnesota*, 223 U. S. 335.

Held, further, that the tax was not to be deemed double or excessive from the fact that the receipts of the railroads from shipments in these cars, less the rental paid to the company, were made a factor in valuing the property on which the railroads were taxed.

129 Minnesota, 30, affirmed.

THE case is stated in the opinion.

Mr. Robert E. Olds, with whom *Mr. Frank B. Kellogg*, *Mr. Cordenio A. Severance* and *Mr. Thomas Creigh* were on the brief, for plaintiff in error.

Mr. Lyndon A. Smith, Attorney General of the State of Minnesota, with whom *Mr. Egbert S. Oakley*, Assistant Attorney General of the State of Minnesota, was on the brief, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

A tax, for each of the years 1907 to 1912, inclusive, imposed under a law of Minnesota (Acts 1907, c. 250; 1909, c. 473; 1911, c. 377) against the Cudahy Packing Company as a freight line company, and sustained by the Supreme Court of the State (129 Minnesota, 30), is here in question. Whether the tax constitutes an unconstitutional restraint or burden on interstate commerce is the matter for decision.

The company is an Illinois corporation and operates plants in Iowa, Missouri and Nebraska for slaughtering live stock and converting the same into fresh meats and other articles of commerce. It sells the products throughout the United States, maintains branch houses in several States, including three in Minnesota, and owns a line of refrigerator cars wherein the products are shipped to the branch houses and places of consumption. Under a contractual arrangement it supplies these cars to the railroads for use in such transportation and receives therefor a fixed compensation per mile of travel. In the territory embracing Minnesota this compensation or rental is one cent per mile whether the cars be loaded or empty. Usually the cars are moved to particular destinations with loads of the company's products and are returned empty to be loaded again, but where it is practicable to do sc the railroads are free to carry other freight in them on the

return trip. The company pays the usual tariff rates for the transportation of its products, just as though the railroads owned the cars, and also bears the expense of all repairs save such as become necessary through negligent handling by the railroads. The use made of the cars in Minnesota consists in transporting the company's products (a) across the State from points without on one side to points without on another, (b) from points without to points within the State and the reverse, and (c) between points within the State. Of their total mileage in the State 90 per cent. is in interstate and 10 per cent. in intrastate transportation. The average number of cars in the State per day ranges from 10 to 12.

The cash value of each car, as a separate article of tangible property, is from $700 to $900, and the intangible property incident to their combined use under the contractual arrangement with the railroads is also, as the record shows, of substantial value. The tax in question is all that is assessed against the company in respect of the cars or the intangible property. It has other tangible property in the State, not part of its car line, whereon it pays the usual local taxes.

The receipts of the railroads from shipments carried in these cars in Minnesota, less the compensation or rental paid to the company, are added to the other gross earnings of the railroads from business in the State and the total is taken as the value for purposes of taxation of the property which the railroads own or operate in the State for railway purposes.

As construed and applied by the state court, the Minnesota law requires a freight line company, meaning a company furnishing or leasing cars to railroads for freight transportation, to report annually its gross earnings from the operation of its car line within the State and to pay, in lieu of other taxes on the property so employed, a tax fixed at a stated per cent. of such earnings. That court

holds that this law is an exertion of the power of the State to tax the property within its limits from which the earnings are derived and is intended to embody a practical method of reaching and valuing that property, tangible, and intangible, for taxing purposes.

In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 165 U. S. 194; *s. c.*, 166 U. S. 185; *American Refrigerator Co.* v. *Hall*, 174 U. S. 70; *Union Refrigerator Co.* v. *Lynch*, 177 U. S. 149. This is not questioned; but it is insisted that the tax imposed is not a property tax but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. *Fargo* v. *Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217. On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, "by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed, they are not open to attack" as restraining or burdening such commerce. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688; *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191

U. S. 379, 387; *Fargo* v. *Hart*, 193 U. S. 490, 499; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, *supra*.

As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the legislature, for the Act of 1909 speaks of the tax as "a tax upon its [the company's] property" and the Act of 1911 says "the value of such property [that used within the State] for purposes of taxation is to be determined" by reference to the gross earnings from the mileage within the State. True, this local view is not conclusive on this court, but it cannot be rejected unless it can be said to be ill founded.

The question of the nature and effect of taxes more or less like this has been repeatedly considered in this court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, and *United States Express Co.* v. *Minnesota*, 223 U. S. 335, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent. of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a "gross revenue tax" and declared that it was to be "in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets" of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way. The other case involved a tax in Minnesota of a desig-

nated per cent. of the gross earnings of an express company from business done in that State, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State.

The law imposing the present tax is closely patterned after the one exacting the tax upheld in *United States Express Co.* v. *Minnesota*, and contains the same declaration that the tax shall be in lieu of other taxes on the property. The statutes differ only in minor details and are both parts of a general system which the State applies to railroads, telephone lines and the like. So, unless this tax be otherwise distinguishable, it must, under the decision in that case, be regarded as a property tax and not as laid on the gross earnings.

Because the usual tax rate, if applied to the cash value of the cars taken separately, would result in an appreciably lower tax, it is insisted that the tax imposed is in excess of what would be legitimate as an ordinary tax

on the property. But the contention proceeds on an erroneous assumption. The State is not confined to taxing the cars or to taxing them as separate articles. It may tax the entire property, tangible and intangible, constituting the car line as used within its limits, and may tax the same at its real value as part of a going concern. The record makes it reasonably certain that the property, valued with reference to its use and what it earns, is worth considerably more than the cash value of the cars taken separately—enough more to indicate that the tax is not in excess of what would be legitimate as an ordinary tax on the property taken at its real or full value.

Because the receipts of the railroads from shipments in these cars, less the rental paid to the company, are made a factor in valuing for taxation the property on which the railroads are taxed, it is contended that the cars are taxed twice, once to the company and again to the railroads, and are excessively valued. The contention apparently assumes that the receipts from such shipments arise solely from the use of these cars, whereas they arise in part from the use of the tracks, locomotives, fuel, labor and the like provided by the railroads. Not improbably only a minor part is fairly attributable to the use of cars. In any event, the company has an interest in the car line which yields it a rental of one cent for each mile of travel. This interest is taxable and the State values it for that purpose by the rental received. In valuing the property on which the railroads are taxed the amount of the rental is deducted from their earnings. This plainly discloses a purpose to avoid taxing the same property twice or at more than its value, measured by what it earns.

We think the tax is not distinguishable from that sustained in *United States Express Co.* v. *Minnesota.*

Judgment affirmed.

MANUFACTURERS RAILWAY COMPANY AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

MANUFACTURERS RAILWAY COMPANY AND ANHEUSER-BUSCH BREWING ASSOCIATION ET AL. *v.* UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Nos. 24, 25. Argued March 21, 22, 1917.—Decided April 15, 1918.

In a proceeding before the Interstate Commerce Commission to establish through routes and joint rates over the Manufacturers Railway—a company operating terminals at St. Louis and held by the Commission to be a common carrier, though controlled and principally used by the intervening Brewery,—and certain trunk lines at St. Louis, the contention was that the latter, in canceling tariffs wherein they had applied their St. Louis rates to industries on the Railway and had absorbed its switching charges, and in continuing this practice as to another terminal—St. Louis Terminal Railroad Association—whose shares they owned, were guilty of unlawful discrimination, in avoidance of which the absorptions should be reëstablished.

Held: (1) That the finding of the Commission, based upon differences of location, ownership and operation, that there was not undue discrimination was not without evidentiary support and not an abuse of discretion.

(2) That the Commission was justified by the evidence in holding that not more than $2.50 per car should be added to the trunk line rates for the Railway terminal, upon the ground that such limitation was necessary to avoid undue preferences or indirect rebates to the Brewery.

(3) That, as the controversy was not directed to the reasonableness of the trunk line rates, the Commission, in fixing the maximum joint

rate, properly assumed them to be reasonable *per se;* the "increased rate clause" of the Commerce Act, as amended (c. 309, 36 Stat. 552), does not lay upon the carrier the burden of proving a new rate reasonable when that question is not involved in the hearing.

(4) That the decision of this court, respecting the St. Louis Terminal Association (224 U. S. 383, 412; 236 U. S. 194, 207–209), left untouched the powers of the Commission, and complainants were entitled at most to have the Commission consider the nature and objects of the Association as circumstances bearing upon the question of discrimination and questions pertinent thereto.

In fixing joint rates it is within the discretion of the Commission to allow the carriers to arrange the divisions, as contemplated by the first paragraph of § 15 of the Commerce Act (36 Stat. 551), subject to review by the Commission.

Whether a discrimination is undue or unreasonable or unjust is a question of fact confided by the Commerce Act, as amended (§§ 15, 16), to the judgment and discretion of the Commission, and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.

A court cannot substitute its judgment for that of the Commission upon a purely administrative matter.

Common use of the facilities of the St. Louis Terminal by fourteen trunk lines owning its capital stock, under a single arrangement by which they absorbed the terminal charges, *held* not as a matter of law to entitle another terminal company, having no trunk line and doing terminal switching alone, to precisely the same treatment.

The District Court has no jurisdiction under the Commerce Acts to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. So *held* where the Commission fixed maximum joint rates for trunk lines and a terminal company, and the gravamen of the latter's suit was the failure to fix the divisions.

A proper foundation for reparation was not laid in the evidence submitted to the Commission in this case.

Pending a proceeding before the Commission involving an inquiry as to how much could properly be allowed to a terminal as divisions or absorptions by trunk line carriers, one of the latter, which was

and remained a party, filed and published a tariff providing for absorptions of the terminal's switching charges up to a certain rate per car which it had previously allowed and retracted and was in the position of attacking in the proceeding as illegal and excessive. The Commission suspended the proposed absorption for 120 days from the effective date, and then for 6 months, to await its decision in the pending inquiry, treating the one as ancillary to the other and as involving no different question on the merits, and, upon deciding the original matter within the 6 months, canceled the tariff without having given it a separate hearing. *Held*, proper, and not inconsistent with the provisions of § 15, second paragraph, of the Commerce Act, as amended June 18, 1910, c. 309, 36 Stat. 552, respecting suspensions of new rates.

Although a rate-fixing order is not conclusive against attack upon the constitutional ground of confiscation, correct practice requires that the objection be made, and all evidence pertinent thereto adduced, before the Commission in the first instance if practicable.

Where the Commission, after full hearing, sets aside a rate as unreasonably high, only a clear case would justify a court, upon evidence newly adduced but not newly discovered, in annulling the Commission's action upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation.

The evidence produced and relied on in the District Court by the complaining terminal,—consisting of expert valuation of its leasehold and other property, calculations of revenue and expenses, with allocations to its interstate business,—examined and *held* largely speculative, inconsistent with other evidence, in part based on erroneous theories, and, as a whole, insufficient to establish that a rate of $4.50 per car for interchange movements would be confiscatory.

The voluntary adoption of a rate by a carrier is some evidence against the carrier that it is remunerative.

In estimating the value of a leasehold to the lessee, taxes paid by the lessor should not be deducted from the annual cost as measured by the gross rental.

A finding by the Commission that a railway is a common carrier does not mean that all of its property must be treated as employed in the public service; portions used as a private plant facility should not be considered in determining the adequacy of a rate.

A city leased for railway purposes land, which in considerable part constituted a public wharf. *Held*, that, if the rental was less than

the fair annual value, it must be presumed the excess was granted to the public, and not to the private interest of the carrier, in capitalizing its assets for the purpose of testing the adequacy of a rate.

In testing the adequacy of an interstate rate, it is error to base the computation on the receipts and expenses of the carrier's entire business without considering the adequacy of its charge for services not affected by the rate or their possibly private character.

Affirmed.

These are appeals from final decrees made by the District Court in two cases dismissing petitions filed by the appellants for the purpose of enjoining the enforcement of orders made by the Interstate Commerce Commission. The cases are closely related to each other, were argued at the same time, and will be disposed of in a single opinion.

The facts are intricate, and have been the subject of consideration by the Commission in three reports (21 I. C. C. 304; 28 I. C. C. 93; 32 I. C. C. 100), from which the following resumé is taken:

Situate in South St. Louis, within the limits of the City of St. Louis, Missouri, and on the high ground back from the Mississippi River, are the great industrial plants of the Anheuser-Busch Brewing Association, a corporation, hereinafter called the Brewery, which occupy approximately 126 acres—35 or 40 city blocks—intersected by streets. There are numerous structures, in which are conducted the manufacture and marketing of beer and related products. The tonnage shipped by and to the Brewery is very heavy, amounting to upwards of 40,000 carloads per annum, or approximately one-thirtieth of all the inbound and outbound traffic of the entire city. For a number of years following the establishment of the Brewery its inbound raw materials and outbound products were drawn by horse and wagon from and to the tracks of the St. Louis, Iron Mountain & Southern Railway Company, hereinafter called the Iron Mountain,

on the river front. In the year 1885 this method was abandoned and a plant railway operated by steam was substituted. Two years later the plaintiff Manufacturers Railway Company was incorporated, hereinafter referred to as the Railway, to which control and operation of the plant system was made over. The Railway now has a main line of 2¼ miles, and approximately 23 miles of side tracks. It is engaged exclusively in the switching and delivery of carload freight within the City of St. Louis. The traffic of the Brewery constitutes about 75 per cent. of its total tonnage. At the time of the hearing before the Commission, it owned no cars and only four locomotives; the cars used for the transportation of shipments originating on its line being furnished principally by the St. Louis Refrigerator Car Company, a substantial portion of whose stock is owned by the holders of a majority of the stock of the Brewery. The facilities of the Railway, however, for a considerable period and to a large extent had been available to the public, and it was held by the Commission to be a common carrier, and not a mere industrial or tap line. But a majority of the stock of the Railway was and is owned by the owners of a majority of the stock of the Brewery, so that the same interest controls both properties.

In the year 1888 the Railway leased its tracks to the Iron Mountain for ten years, and in 1898 renewed the lease for ten years. Up to this time the only outlet from the rails of the Railway was to the main line of the Iron Mountain on the bank of the Mississippi River. In 1903 the Railway undertook a further development of its terminal facilities, and the city authorized several extensions along certain streets, and leased to it a part of a public wharf. In 1908 the Railway declined to grant a further lease to the Iron Mountain, and took over the operation of its property, with the object of enlarging and extending its facilities, serving the public in that

portion of the city generally, and connecting with all St. Louis lines by a junction with the St. Louis Transfer Railway.

The principal terminal facilities of the City of St. Louis are dominated by the Terminal Railroad Association, hereinafter referred to as the Terminal, a corporation whose capital stock is owned in equal shares by the 14 trunk lines entering that city. The Terminal, or its proprietary or tenant lines, owns or controls all bridges and ferries giving access to terminals within and lines directly entering St. Louis, so that no interstate shipment can enter or leave the city except over those lines. In St. Louis there are three industrial centers naturally requiring terminal facilities. The northern section of the city along the Mississippi River is one of these, and is served by a considerable mileage of the Terminal and the rails of nine of the trunk lines. In the western section, in what is known as the Mill Creek Valley, there are many industries served by a considerable mileage of the Terminal and the rails of four of the trunk lines. In South St. Louis the companies rendering terminal service are the Manufacturers Railway and the Iron Mountain. The St. Louis Transfer Company, one of the subsidiaries of the Terminal, has a line along the river bank, physically available only to a negligible extent, and the lines of the Iron Mountain generally follow the bank of the river and reach such industries as are adjacent thereto. For a considerable distance along the river in this section of the city there is a steep grade to be overcome in reaching industries situate back from the river, and to confine these industries to the terminal facilities of the Iron Mountain would require a team haul up from the bank of the river. The Railway's terminals reach the high ground referred to, and besides its connection with the Iron Mountain it constructed in 1908 a viaduct leading over the Iron Mountain tracks and then descending to

their level and forming a connection with the tracks of the Transfer Railway, which lie between the Iron Mountain and the river. Through the Transfer Railway it reaches the Terminal, and through the Terminal reaches all the trunk lines that enter St. Louis. The Transfer Railway is a corporation whose stock is owned by the Wiggins Ferry Company, whose stock in turn is owned by some of the trunk lines that own and control the Terminal.

The St. Louis Southwestern Railway Company, a trunk line hereinafter called the Cotton Belt, does not reach St. Louis with its own rails, but enters East St. Louis *via* the rails of the Iron Mountain, over which it has trackage rights. In serving industries within St. Louis it uses the facilities of the Terminal and of the various carriers within the city, including the Railway.

By ordinance of the City of St. Louis the Railway is prohibited from charging more than $2 per car for local switching. Prior to March 1, 1910, and including the entire 20-year period covered by the leases of the Railway to the Iron Mountain, the trunk lines applied their St. Louis rates to traffic originating at or destined to industries served by the Railway, absorbing and paying to the Railway, after the termination of the Iron Mountain lease, a switching charge of from $3 to $5.50 per car, said to average about $4.50. The result of this was that shippers served by the Railway received their transportation at the St. Louis rates without paying anything additional for the terminal service performed by the Railway.

At the same time the trunk lines absorbed the terminal charges of the Terminal (about $3 per car), and similar allowances or absorptions were made by the trunk lines to twelve other industrial lines in and about the city.

About December 31, 1909, the trunk lines by concerted

action notified the Railway that from and after March 1, 1910, they would cancel the tariffs wherein they had applied the St. Louis rates to industries on the Railway and had absorbed the Railway's terminal charges. Similar notice was given to the twelve other industrial lines, and accordingly the allowances were canceled at the date notified, but the practice of absorbing the charges of the Terminal was not discontinued.

On March 4, 1910, the Railway and certain shippers on its line, including the Brewery, filed a complaint against the trunk lines before the Commission (I. C. C. Docket No. 3151), in which it was alleged that the tariff cancellations were in effect an unjust and unlawful refusal by the trunk lines longer to continue through routes and joint rates theretofore established; that said action constituted an unlawful discrimination as between industries and shippers on the lines of the Railway and other industries and shippers in St. Louis, and subjected the traffic of the Railway to undue and unreasonable disadvantage, and gave undue and unreasonable preference to the shipping public in other parts of St. Louis; and further that the concerted action of the trunk lines was the result of an unlawful combination and conspiracy, in violation of the Sherman Anti-Trust Law. Complainants asked that through routes and joint rates be reestablished to and from points on the Railway from and to points on each of the trunk lines and points beyond, and that proper and reasonable divisions of the through or joint rates be established. There was also a prayer for reparation and for general relief.

The trunk lines answered, evidence was taken (none, however, being introduced by the trunk lines beyond such as was brought out by examination of complainants' witnesses), and, after a hearing, the Commission, under date June 21, 1911, filed a first report of its conclusions. 21 I. C. C. 304. It declared that the Railway was a

common carrier, within the provisions of the first section of the Commerce Act, and not a mere plant facility of the Brewery; that it supplied reasonable and necessary terminal facilities to many industries besides the Brewery; and that the payment to it by the trunk lines of a reasonable and just portion of the St. Louis rates for the terminal service rendered by it was not unlawful; that the action of the trunk lines in canceling the divisions and absorptions which for many years had been included in the St. Louis rates had subjected complainant shippers and a considerable portion of the public of South St. Louis to the payment of unjust and unreasonable transportation charges and to undue discrimination and disadvantage; that there had been in effect a failure on the part of the complainant carrier and defendants to agree to the apportionment or division of the rates or charges, and this situation under the statute imposed upon the Commission the duty of adjusting the matter; that in view of the peculiar features of the case detailed in the report (including the heavy shipments to and from the Brewery, and the fact that the same interests owned a majority of the stock of the Railway and of the Brewery), it was important that the allowances to the Railway and the services rendered by it to its patrons in consideration of such allowances should be equitably adjusted, and that the trunk lines should closely guard these features in making any allowances or divisions to the Railway, in order to avoid the charge of unjust discrimination or undue preference or advantage; but that the record before the Commission did not present a sufficient basis for a satisfactory determination of the question as to the reasonable and just division or allowance to the Railway, and the further question as to whether a part of the service performed by it was or was not plant facility service. These questions were reserved for further examination.

After the hearing, and before the making of this first

report, practically all of the carriers published and filed tariffs stating allowances or divisions with the Railway. These were suspended by the Commission pending its decision, and upon the making of the first report an order was entered canceling the suspensions, effective July 15, 1911. No other order was made at that time.

Thereafter a supplemental hearing was had upon which additional evidence was submitted by the trunk lines, and as a result the Commission filed its second report, dated June 21, 1913 (28 I. C. C. 93), but still made no order. In this report the Commission (p. 105) adhered to its former conclusion that the Railway was a common carrier subject to the act, but in other respects materially modified its views, now holding: that the payments formerly made out of their through rates by the trunk lines to the Railway were absorptions in compensation for services rendered to the trunk lines, and were not divisions of joint rates as for services rendered for the shippers served by the Railway, as they would be considered under joint rates prescribed by order of the Commission; that in the absence of any undue discrimination with respect to these absorptions the Commission could make no lawful order with reference thereto; that the defendant trunk lines, in delivering freight at the St. Louis rates to points on the rails of the Terminal and in refusing to bear the expense of similar delivery by the Railway upon its rails, were not subjecting the shippers located on and served by the Railway to undue prejudice and disadvantage; that therefore the only lawful order the Commission could make was in the establishment of joint rates, under which that part of the service performed by the Railway would be in the contemplation of the Commerce Act a service performed for the shipper, to be paid for by him, and not a service rendered for the trunk lines, the expense of which could be required by the Commission to be borne by them; that the trunk line rates to

St. Louis not being shown to be unreasonable in themselves, the joint rates with the Railway necessarily must be in excess of these by the amount of the Railway's part of the through charge, and that joint through rates should be established on that basis. Taking up the question of the amount to be added to the trunk line rates in making the joint rates, the existing allowances being, as stated, from $3.00 to $5.50 per car, and complainants asking for a uniform allowance of $4.50 per car, said to be lower on the average, the Commission called attention to the fact that the Railway's rate for local shipments between any points on its line was $2 per car, fixed as a maximum by city ordinance; for intra-plant movements, availed of only by the Brewery—that being the only industry having need for such service—$1 per car; and for weighing movements 25 cents per car; and that the Railway had a contract with the Cotton Belt under which it handled shipments for the latter, under certain exemptions from liability for damage, for $1 per car, and had offered the same contract to other carriers. Considering these facts with the other testimony submitted on this phase of the case, the Commission expressed the opinion that the division of the joint rates accruing to the Railway should not exceed $2 per car, saying: "However, we shall not by definite finding and order fix these divisions now. This is our original finding with respect to the establishment of joint rates, and the carriers, in accordance with the provisions of the act, will be given an opportunity to agree among themselves." In conclusion the Commission announced: "We regard the present allowances which, as stated, average slightly above $4.50 per car, as effecting unlawful results."

Following the partial decision of the Commission in its first report, most of the trunk lines reinstated the allowances to the Railway, and those allowances, averaging about $4.50 per car, were being paid at the time of

the making of the second report. Pursuant to that report, they were canceled.

In this situation the Railway, the Brewery, and other complainant shippers applied to the Commission for a rehearing, and the case was reargued and taken under advisement November 13, 1913. Pending its decision, and on December 7, 1913, the Cotton Belt and another trunk line, both defendants in I. C. C. Docket No. 3151, published and filed with the Commission tariffs to become effective January 7, 1914, providing for absorption of the switching charges of the Railway up to $4.50 per car. These absorptions were suspended by order of the Commission December 19, 1913, until May 7, 1914, and by an order dated April 20, 1914, were suspended for a further period of six months, or until November 7, 1914. The suspension case was designated as Investigation and Suspension Docket No. 355, and was treated by the Commission as ancillary to the principal case, I. C. C. Docket No. 3151.

Under date July 10, 1914, and prior to the expiration of the second period of suspension, the Commission filed its third and final report, 32 I. C. C. 100. It affirmed the findings and conclusions contained in the second report, with an "interpretation"; still dealt with the Railway as a common carrier; held that the trunk lines by their action in canceling the allowances to the Railway while continuing to absorb the charge of the Terminal, whose stock they owned, did not subject the Railway or its shippers to undue prejudice or disadvantage; that the amounts formerly paid by the trunk lines to the Railway were voluntary allowances and could not be considered by the Commission to be divisions of joint rates which it could by affirmative order establish; that the separate rates of the trunk lines and of the Railway being necessarily regarded upon the record before the Commission as *prima facie* reasonable, any joint rates which

the Commission could by affirmative order require the carriers in the through route to establish would necessarily be higher than the trunk line rates to and from St. Louis by the amount of that part of the through charge which would accrue to the Railway; that while the Commission could not require the trunk lines to participate with the Railway in joint rates no higher than their rates to St. Louis, they might voluntarily participate on that basis, provided that in the division they did not pay to the Railway for its service more than was just and reasonable, and did not thereby in the amount of the excess indirectly refund to the Brewery a part of the through transportation charges paid to them by the Brewery; that the former allowances of $4.50 per car paid by the trunk lines to the Railway were excessive; and, instead of a maximum division to the Railway of $2 per car, as suggested in the second report, upon further consideration the view was expressed that the division accruing to the Railway should not exceed $2.50 per car, subject to modification upon further hearings with respect to divisions if the necessity should arise

In announcing its purpose to make an order requiring the establishment and maintenance by complainant Railway and defendant trunk lines of maximum joint rates not exceeding the St. Louis rates of the trunk lines by more than $2.50 per car, the Commission declared that when this had been done, whether the carriers in the through routes should establish rates on that maximum basis, or by voluntary agreement on a basis not higher than the St. Louis rates, then, upon failure of the trunk lines and the Railway to agree upon the proper basis of division, and upon request made to the Commission for the purpose, it would fix the divisions upon further investigation as provided in the act; if that inquiry should confirm its present impression that $2.50 per car was a reasonable division to the Railway, that would be granted;

and if, on the other hand, the Commission should be convinced by the evidence that $2.50 per car was too much or not enough, it would fix the amount accordingly; and that if not asked by the carriers to fix the divisions, the Commission, upon proper cause appearing, might in its discretion institute an inquiry upon its own motion, under those provisions of the act which forbid the giving or receiving of rebates or undue concessions, directly or indirectly, by any device whatsoever, having in mind particularly the fact of the common ownership of Railway and Brewery stock.

Thereupon an order was made under I. C. C. Docket No. 3151, dated July 10, 1914, requiring the trunk lines and the Railway on or before January 1, 1915, to cease and desist from charging their then present rates on traffic between points on the line of the Railway and points on the trunk lines in other States to the extent that those rates exceeded contemporaneous St. Louis rates by more than $2.50 per car, and to put in force on or before the same date and maintain thereafter for a period of not less than two years rates applicable to traffic on the Railway not exceeding rates contemporaneously in effect between St. Louis and points in other States by more than $2.50 per car.

At the same time, and upon the basis of the same report, an order was made under I. & S. Docket No. 355, canceling the Cotton Belt tariff that had been suspended by the orders of December 19, 1913, and April 20, 1914.

The former order of July 10 was attacked in a suit brought in the District Court by the Railway, in which the Brewery and other shippers on the line of the Railway intervened as co-petitioners. Answers were filed by the United States and the Interstate Commerce Commission, evidence was taken, and upon final hearing the suit was dismissed, without opinion. No. 25 is an appeal from

this decree. The orders of April 20 and July 10 under I. & S. Docket No. 355 were the subject of attack in a suit by the Railway and the Cotton Belt, in which answers were filed by the United States and by the Interstate Commerce Commission, and upon evidence taken the court, without opinion, dismissed the petition. From this decree the appeal in No. 24 was taken.

Mr. Sidney F. Andrews and *Mr. Daniel N. Kirby*, with whom *Mr. Charles Nagel* was on the briefs, for appellants:

The reasonableness *per se* of the advanced rates, made effective by the cancellation of the tariffs, was in issue and was actually passed upon by the Commission. The cancellation of the absorptions constituted an "increase" of the former rates. 30 I. C. C. 501, 503; *id.* 388, 389. See also 30 I. C. C. 16; *id.* 349; *id.* 538, 545; *id.* 696, 699; 31 I. C. C. 633, 635; 29 I. C. C. 653; *id.* 70, 78. And the burden rested on the trunk line carriers to justify the increase. Commerce Act, § 15; 30 I. C. C. 415, 419; *id.* 581, 583; 31 I. C. C. 351, 355; *id.* 573, 582; 30 I. C. C. 505, 508.

In the absence of proof to the contrary a presumption arose from the long continuance of the former rates that they were *per se* reasonable. *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320, 336; 26 I. C. C. 402, 404; *id.* 422, 429; 31 I. C. C. 244, 253; 34 I. C. C. 234, 247; 35 I. C. C. 47, 68. The reasonableness of the advanced rates was assumed by the Commission without evidence.

The carrier may increase a rate or it may curtail the service performed for it, but if such action is challenged it must bear the burden of showing that the new rate or service is reasonable and free from unjust discrimination. 34 I. C. C. 242. In its second report the Commission held that while the trunk lines might voluntarily extend their

service to points on the Manufacturers Railway at the St. Louis rates, they could not be compelled to do so; the reason being that their rates to the ends of their own rails were reasonable *per se*, and that therefore for any service beyond they would be entitled to additional compensation. Hence the assumption of the reasonableness of their rates to the end of their rails formed the foundation of the conclusion. For more than twenty years, the former rates of the trunk lines had included such service beyond their own rails (first report, 21 I. C. C. 313), and under their new tariffs the carriers were performing a less service for the same compensation, which was equivalent to an advance in their rates. A proper determination, therefore, of the issue of the reasonableness *per se* of the advanced rates was all-controlling. Such finding having been made without evidence, the order based thereon was void and should have been set aside. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167.

The advanced rates were presumptively unreasonable because established not by free competition but by joint and concerted action of the trunk lines, pursuant to their conspiracy to further the unlawful monopoly known as the Terminal Railroad Association of St. Louis. Appellants did not and do not seek to have the Association, either directly or through its proprietary lines, declared a monopoly, or enjoined or punished in any way as a monopoly. They did and do contend that the Sherman Act is pertinent and necessary to be taken into consideration, because it is a part of the law of the land. While it does not confer special jurisdiction on the Commission, or the Commerce or District Courts in reviewing orders of the Commission, it does enter into the duties and powers of the Commission as a limitation upon and qualification of them, and it enters also into the duties of

carriers toward each other and toward the shipping public, as a limitation and qualification upon them. When an increase in rates results from free competition, it is entitled (in the absence of statute providing otherwise) to the presumption of reasonableness; on the other hand, when a change in rates is shown to have resulted from unlawful concert of action, prompted by motives which preclude a consideration of the reasonable merits of such action, then no presumption of reasonableness can attach, and, in such a case, the circumstances showing motive and unreasonableness become a pertinent and important subject of inquiry, as tending to show unreasonableness. 21 I. C. C. 316; 10 I. C. C. 505, 540; 12 I. C. C. 236, 241. The facts showing unlawful conspiracy violative of the Sherman Act are proper to be considered as compelling the conclusion that the cancellation tariffs, the increase of rates resulting therefrom, and the attitude of the trunk lines throughout toward the Railway and its shippers are presumptively unreasonable, unjust, and intended to be discriminatory.

In the absence of proof sustaining the reasonableness *per se* of the advanced rates, and in view of the presumption of the reasonableness *per se* of the former rates, and of the further presumption that the increased rates were unreasonable, the only valid order which the Commission could have made was a mandatory one commanding the carriers to restore their former rates. It was this for which complainants contended. 28 I. C. C. 110. Under similar circumstances such a course has been frequently followed by the Commission. 23 I. C. C. 518, 519. See 34 I. C. C. 234.

When the ultimate facts are admitted or not in dispute, the legal effect of those facts presents a question of law, and is reviewable as such.

The Commission based its conclusion that there was no undue discrimination entirely upon its further conclusion

(which was purely a conclusion of law, not involving any inference of fact), that the terminal service performed by the lines of the Terminal and of its operating subsidiaries and of the terminal facilities of the Iron Mountain, and of the five other trunk lines, which perform terminal switching in St. Louis in connection with other line carriers, must as a matter of law be treated as part of the line haul of the trunk lines, and not as distinct terminal services performed by independent terminal carriers competing with the Railway; and this notwithstanding the fact that, while refusing to continue to absorb the terminal charges of the Railway, the trunk lines were at the same time continuing to absorb the terminal charges of the Terminal and of the Transfer Railway, and of the various trunk lines which performed terminal services in St. Louis. By that interpretation of the law, the Commission permitted the trunk lines to deny the St. Louis rate to shippers on the Railway, while at the same time permitting it to all shipping competitors within the same switching zone (the City of St. Louis), and thus placed the Railway and its shippers at the disadvantage of having higher rates than any other shipping points in St. Louis, and put them at the mercy of the trunk lines owning the Terminal, by holding that while the trunk lines might by voluntary act as a matter of grace absorb (or refuse to absorb) the charges of the Railway, the Commission could not compel them to do so.

It is a necessary conclusion from the decision of this court in the *Terminal Case*, that if the Terminal be held an integral part of the trunk lines and its service a part of their line haul, then the combination is unlawful and would be dissolved; if, on the other hand, it is an independent institution, "solely engaged in operating terminal facilities," performing a distinct terminal service (not a part of the line haul), then it is lawful, but in the latter case it must be treated as an independently

operating terminal carrier, for all purposes of competition.

The trunk lines (before this court) justified the Terminal's continued existence on the ground that it is an independent terminal carrier, but on the other hand, in their treatment of the Railway, they discriminated in favor of the Terminal and in favor of its shippers and in favor of each other and against this competitor, on the ground that the Terminal is legally an integral part of the trunk lines, and its service a part of the line haul, and they thereby contravened the decision of this court in the *Terminal Case.*

Yet that is precisely what the Commission held they might do, since its decision of "no discrimination" was based squarely upon its holding that the Terminal was not an independent terminal system.

Nor can the conclusion of the Commission on the status of the Terminal be sustained on the ground that the trunk lines own all of its shares of stock. *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108; *United States* v. *Union Stock Yards Co.*, 226 U. S. 286.

The Commission erred in concluding that the terminal facilities of each of the six trunk lines which perform terminal switching in St. Louis should be treated as merely extensions of the rails of all the other trunk lines; and that the terminal switching performed by each in connection with the line haul performed by another trunk line should be treated as a part of the line haul of the latter.

The Commission also erred as a matter of law in holding that the existence of "reciprocal switching" relations between the trunk lines made their St. Louis terminals mere extensions of the rails of all the trunk lines, and made the terminal service performed by them a part of the line haul. *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S.

1, 16, 17; *Louisville & Nashville R. R. Co.* v. *United States*, 227 Fed. Rep. 258, 269.

The decision of the Commission on the question of discrimination is directly contrary to its decisions in analogous cases. 34 I. C. C. 234, 237; 28 I. C. C. 101; 29 I. C. C. 212; 34 I. C. C. 596, 601; 37 I. C. C. 497; 36 I. C. C. 146.

The Commission erred in the view that there is a legal distinction between "divisions of joint rates," and "absorptions of switching charges;" that it lacked power to prescribe "absorptions;" and that therefore the restoration of the Railway's canceled absorptions must be left to the volition of the trunk lines. 28 I. C. C. 103. The Commission had this authority under its powers to establish maximum joint rates and to prescribe divisions. Commerce Act, §§ 1, 3, 15. Discrimination by carriers against connecting lines is forbidden by § 3. The "use of tracks" in § 3 does not mean an extension of service through divisions or allowances. *Pennsylvania Co.* v. *United States*, 214 Fed. Rep. 445, 447; 236 U. S. 351.

Divisions and allowances are identical in substance, each being an agreed participation in the revenue arising out of a through and joint rate. *Fourche River Lumber Co.* v. *Bryant Co.*, 230 U. S. 316, 322, 323. The distinction that allowances relate to services rendered for a trunk line and divisions to services rendered a shipper is erroneous. In each case the service is for a tariff charge, paid out of a through joint rate at a figure agreed to by all participating carriers, and the service of each participating carrier is rendered for the shipper.

The Commission erred in holding that under no circumstances is a carrier entitled to reparation, and in ignoring the prayer of the complaining shippers for reparation. Commerce Act, §§ 3, 8, 9, 13. Although the order is silent concerning the reparation prayed for, and is thus negative in form, its denial of a lawful right is

affirmative in effect. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 234 U. S. 476.

The order of the Commission suspending the tariff of the Cotton Belt for a period of six months is arbitrary and made without lawful authority and in effect a denial of due process of law. Commerce Act, § 15; *American Sugar Refg. Co.* v. *Delaware, Lackawanna & Western R. R. Co.*, 207 Fed. Rep. 733; *Akerly* v. *Vilas*, 24 Wisconsin, 171; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93.

The order is confiscatory.

Mr. D. Upthegrove, *Mr. A. L. Burford* and *Mr. Edward A. Haid* filed a brief for St. Louis Southwestern Ry. Co. in No. 24.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. Justice Pitney, having made the foregoing statement, delivered the opinion of the court.

It will be convenient to dispose first of No. 25.

The scope of the order of July 10, 1914, under I. C. C. Docket No. 3151, is simple and limited; the grounds of attack upon it are many and diverse, and based rather upon what it does not, than upon what it does, require to be done. As is pointed out in the prefatory statement, the complaint before the Commission was made by the Railway, the Brewery, and certain other shippers served by the Railway. The respondents were the trunk lines. The complaint charged that the then recent tariff can-

cellations were in effect a refusal to continue through routes and joint rates from and to points on the line of the Railway; alleged that this constituted unreasonable discrimination between shippers on the line of the Railway and other shippers in the City of St. Louis, and subjected the former to undue prejudice and disadvantage, contrary to § 3 of the Commerce Act (24 Stat. 379, 380, c. 104); and prayed that the trunk lines be required to reëstablish the through routes and joint rates as they existed before the cancellations, that the reasonable divisions of the rates be determined, and that due reparation be awarded to the complainants, with such other relief as the Commission might deem necessary. The order under consideration, recognizing through routes as being already in effect (a fact about which there is no dispute), required the Railway and the trunk lines to establish, and for at least two years to maintain, rates not exceeding by more than $2.50 per car the trunk line rates contemporaneously in effect between St. Louis and points in other States.

It is urged that the cancellation of the absorption tariffs on March 1, 1910, constituted an increase of the former rates because it curtailed the service to be rendered under those rates; that the former absorptions presumably resulted in reasonable rates (*Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320, 336); that by the "increased rate clause" of § 15 of the Commerce Act as amended in 1910 (36 Stat. 552, c. 309),[1] the burden was upon the trunk lines to show

[1] "At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act [June 18, 1910], the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

the reasonableness of the new rates; and that, there being no evidence to sustain their reasonableness *per se*, the Commission erred in law in failing to set them aside by restoring the former absorptions.

But this clause of § 15, by the fair import of its terms, imposes upon the carrier the burden of proving the new rate to be just and reasonable, only where that question is involved in the hearing; it does not call for proof as to matters not in controversy. As the Commission pointed out in its several reports (21 I. C. C. 308; 28 I. C. C. 100–101, 103, 105, 110; 32 I. C. C. 102, 105), the complaint was not directed to the reasonableness of the separate rates either of the Railway (one of the complainants) or of the trunk lines. The effort was to require the re-establishment of the former absorptions on the ground that without them the continued practice of absorbing the charges of the Terminal constituted a discrimination as against shippers on the line of the Railway. And when the question of discrimination was finally decided against the contention of the complainants, and the claim of the Railway to be regarded as a common carrier was decided in their favor (both conclusions being supported by adequate evidence), it appearing that through routes actually were in effect after as before the cancellations, the Commission deemed it unnecessary to do more at that time than to fix a maximum for the joint rates, and then await the voluntary action of the Railway and the trunk lines about establishing joint rates within the maximum, and agreeing between themselves respecting divisions.

The question of the reasonableness of the allowances or divisions made and to be made to the Railway came into the case incidentally, but inevitably, because of the heavy shipments to and from the Brewery and the community of interest between it and the Railway. Upon this point there was abundant evidence to support the conclusion of the Commission that in making up the

joint rates not more than $2.50 per car should be added to the trunk line rates to St. Louis, and the intimation (not final, and not carried into the order) that any division to the Railway out of the joint rate in excess of $2.50 per car would amount to an undue preference or indirect rebate to the Brewery. Beyond this, no question of separate rates was involved, and the Commission did not err, in view of the issues, in assuming the trunk line rates to be reasonable *per se*. Although it might have dealt with the divisions in the same order, so far as necessary to prevent undue favoring of the Brewery (*O'Keefe* v. *United States*, 240 U. S. 294, 300–302), it was within the discretion of the Commission to allow the carriers to make their own agreement upon the subject, as contemplated by the first paragraph of § 15 of the act (36 Stat. 551), subject to its review.

It is insisted that the "advanced rates" resulting from canceling the absorptions were presumptively unreasonable because not established by free competition but by concerted action in furtherance of the aims of the Terminal Railroad Association of St. Louis, held by this court to be an unlawful combination in restraint of interstate commerce. *United States* v. *St. Louis Terminal*, 224 U. S. 383. But our decision in that case (224 U. S. 412; 236 U. S. 207–9) left untouched the powers of the Interstate Commerce Commission. Besides, appellants sought no special relief because of the Anti-Trust Act. Hence at the utmost they were only entitled to have the Commission consider the nature and objects of the Terminal Association as circumstances bearing upon the question of discrimination and other questions to which they were pertinent; and this the Commission did. 21 I. C. C. 308, 314; 28 I. C. C. 98, 104–106, 109–110; 32 I. C. C. 102.

It is insisted, however, that the finding to the effect that it was not an undue or unjust discrimination for the trunk lines to refuse to absorb the Railway's charges and

thereby extend their flat St. Louis rates to the territory served by the Railway, while doing so with respect to the territory served by the Terminal, is contrary to the indisputable character of the testimony and inconsistent in law with the very facts found by the Commission. To this we cannot accede. It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 (Act of February 4, 1887, c. 104, 24 Stat. 379, 380) renders unlawful any "*undue or unreasonable*" preference or advantage, prejudice or disadvantage. In the same section the requirement of "all reasonable, proper, and equal facilities for the interchange of traffic" is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended § 15 (36 Stat. 551) it is rates, regulations, or practices that in the opinion of the Commission are "*unjustly* discriminatory, or *unduly* preferential or prejudicial," etc., to which the prohibition is to be applied.

Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of §§ 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589–591, c. 3591; 36 Stat. 551–554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 469–470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Procter &*

Gamble Co. v. *United States*, 225 U. S. 282, 297–298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91.

In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I. C. C. 104, 105; 32 I. C. C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361. The common use of the St. Louis Terminal by the fourteen trunk lines under a single arrangement as to absorption of the terminal charges does not, as matter of law, entitle the Railway, which has no trunk line and does terminal switching alone, to precisely the same treatment. *United States* v. *St. Louis Terminal*, 224 U. S. 383, 405, 406; *Louisville & Nashville R. R. Co.* v. *United States*, 242 U. S. 60.

Criticism is directed to the somewhat abstruse distinction drawn by the Commission between allowances or absorptions made by trunk lines in compensation for services rendered to them and divisions out of joint rates as for services rendered for the shippers (28 I. C. C. 101–106; 32 I. C. C. 102); but we deem it unnecessary to discuss the point. See *Tap Line Cases*, 234 U. S. 1, 28; *United States* v. *Butler County R. R. Co.*, 234 U. S. 29, 35–36; *O'Keefe* v. *United States*, 240 U. S. 294, 302.

It hardly can have escaped attention that the real com-

plaint of appellants respecting the order now under consideration is directed not to what the order requires to be done, but to what it does not require. It granted a part of the relief for which appellants had applied to the Commission. Recognizing the Railway as a common carrier to which allowances and divisions might be accorded by the trunk lines, and that through routes were in operation between the Railway and those lines, it fixed the maximum joint rates, and went no further for the present. The real ground for resorting to the courts in this case is the failure to fix divisions. In effect the District Court was asked to perform a function specifically conferred by law upon the Commission. But that court has only the same jurisdiction that formerly was vested in the Commerce Court (Act of June 18, 1910, c. 309, 36 Stat. 539; Act of October 22, 1913, c. 32, 38 Stat. 208, 219); and it is settled that this does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, *et seq.*

Complaint is made because reparation was not awarded. But we are unable to see that proper foundation was laid for this in the evidence submitted to the Commission.

Nothing more need be said concerning No. 25.

The first question raised in No. 24 is based upon the language of the second paragraph of § 15 of the Commerce Act, inserted by the amendment of June 18, 1910, c. 309, 36 Stat. 539, 552.[1] It is said that the tariff published by

[1] "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so or-

the Cotton Belt December 7, 1913, was a new tariff within the meaning of this provision, and while the Commission was authorized, either upon complaint or on its own initiative, to suspend its operation pending a hearing, this suspension must not be for a longer period than 120 days beyond the time when the tariff would otherwise go into effect unless the hearing could not be concluded within that period, in which case alone the Commission might extend the time of suspension for a further period not exceeding six months. It is contended that no hearing on the matters involved in the suspended tariff was begun within the 120 days, and therefore the second order of suspension, and also the order canceling this tariff, were arbitrary and unlawful; the argument being that the issues involved in I. C. C. Docket No. 3151 were not the same as those presented in the matter of the suspended tariff, I. & S. Docket No. 355, and hence there was no hearing whatever on the latter.

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ders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months."

The form of the orders made by the Commission in I. & S. Docket No. 355 lends color to this argument. The order of December 19, 1913, makes no reference to the proceedings then pending in I. C. C. Docket No. 3151, treats the tariff recently filed as "stating new individual regulations and practices affecting rates and charges," declares that the Commission will enter upon a hearing concerning their propriety, and directs that their operation be postponed until the 7th of May; while the order of April 20 refers to the former one, recites that "such hearing cannot be concluded within the period of suspension above stated," and orders a further suspension until the 7th of November.

But it is not suggested, and there is no ground for supposing, that the parties were misled by the form of these orders. They were parties to I. C. C. Docket No. 3151, then pending. The Cotton Belt was one of the carriers which had canceled the former tariffs authorizing allowances averaging $4.50 per car to the Railway, and the Railway having complained to the Commission of its action, it answered declaring among other things that it canceled the tariff for the reason that it was advised that the allowances theretofore made to the Railway were illegal because the Railway was merely an industrial or tap line and under the law not entitled to any part of the through rate, and further that if the Railway was entitled to compensation as a carrier it was not entitled to receive from the Cotton Belt any allowance out of the through rate, that if entitled to any it was not entitled to the allowance theretofore paid to it under the canceled tariff, and that the allowance given to the Railway was unreasonable, excessive, and unjust.

The issues raised by this answer and by the answers of the other defendant trunk lines, which are briefly recited in the first report (21 I. C. C. 307) but need not be here repeated, necessarily involved, and were treated by the

Commission as involving, the question how much could be allowed by the trunk lines to the Railway out of the through rate without amounting to an undue preference or indirect rebate to the Brewery because of the common control of the Brewery and the Railway. Special attention was called to this in the first report, as appears from what has been recited in the statement prefacing this opinion. And it is obvious that the same consideration was inherent in the case, whether the payments by the trunk lines to the Railway were considered as divisions of joint rates for services rendered for the shippers served by the Railway, or absorptions in compensation for services rendered by the Railway for the trunk lines. In either case, if the allowances to the Railway were made unduly large, the Brewery's share of the profit accruing from them would amount to an indirect preference to the Brewery. *Tap Line Cases*, 234 U. S. 1, 28; *O'Keefe* v. *United States*, 240 U. S. 294, 301–302. Accordingly, in the second report (28 I. C. C. 107), the Commission said: "Complainant railway itself concedes that this question of the amount of the allowance to the railway, but not the question of whether a reasonable allowance should be made, is a matter for closer investigation owing to the common ownership of the stock of the railway and of the brewery, its statement in this respect, however, being based of course upon the understanding that the allowance was to come from the trunk lines." And in the concluding part of its report, the Commission stated (p. 111): "Should one or more of the trunk lines attempt to pay to the railway [more than] the $2 per car which we suggest herein as being in our opinion reasonable for the latter's shippers to pay for its service, another question would be presented in which would figure the fact, much discussed in the record, of the common ownership of the stock of the railway and of the brewery. That question would not arise primarily under section 15 of the act, but under those sections

which seek to prohibit the giving of unlawful concessions by any device whatsoever. It follows from what we have said herein that we regard the present allowances which, as stated, average slightly above $4.50 per car, as effecting unlawful results." This was on June 21, 1913; pursuant to the report the criticised allowances were canceled; and on November 13 in the same year the case was submitted to the Commission upon a rehearing at the instance of the Railway. The Cotton Belt remained a party to the proceeding. The issues raised by its answer had not been finally disposed of, nor its answer withdrawn. Since it involved the public interests, and not merely those of the Cotton Belt, this particular issue hardly could be withdrawn.

The question of the validity of the previous allowances, approximately $4.50 per car, or of any allowance greater than $2.00 per car, being thus bound up in the pending controversy under I. C. C. Docket No. 3151, the Cotton Belt tariff published December 7, 1913, while the Commission had that controversy under advisement, manifestly was an attempt to forestall the decision. There was no error in suspending it pending the decision. And, there being nothing further to be submitted to the Commission in the way of evidence or argument, it was natural, and not inconsistent with the substantial rights of the parties, for the Commission to treat the suspension of the Cotton Belt tariff as a proceeding ancillary to the other, involving no different question on the merits.

The final order setting this tariff aside necessarily rested upon a finding that the proposed absorption was so unduly large as to amount to a preference or indirect rebate to the Brewery. In orders of this kind, not including an award of damages, formal and precise findings no longer are necessary; § 14 having been amended in this respect by Act of June 29, 1906, c. 3591, 34 Stat. 584, 589. See House Report No. 591, 59th Cong., 1st sess., p. 4, explaining this provision of the bill.

What we have said disposes at the same time of the only objection raised against the order of April 20, 1914.

The Railway makes the additional contention that the order of July 10, 1914 (I. & S. Docket No. 355), prohibited the Cotton Belt from paying to the Railway as much as $4.50 per car for its services, and that it amounted to a taking of the Railway's property without due process of law in violation of the Fifth Amendment, because any rate less than that named would be confiscatory. That the order has the effect of prohibiting the Cotton Belt from paying to the Railway as much as $4.50 per car is alleged in the petition of the appellants and admitted in the answer of the United States, and we take it for granted that this is so. It is argued that it was operative upon all the trunk lines, and it is contended that payments by all of these lines upon all interstate car interchanges of any rate less than $4.50 per car would not yield in the aggregate a reasonable return upon the fair value of the Railway's property devoted to the use of interstate commerce.

As a part of the argument, it is urged that the decision of the Commission actually limits the earnings of the Railway to $2.50 per car, alleged to be wholly inadequate. But the order under attack in this suit has no such effect; and the contemporaneous order under I. C. C. Docket No. 3151 merely limits the joint rates to not exceeding $2.50 in advance of the St. Louis rates, and does not deal with the divisions; the opinion expressed upon this point being only tentative.

Appellees contend that the finding of the Commission upon the subject of confiscation is conclusive; or at least that it is not subject to be attacked upon evidence not presented to the Commission, as is attempted here. We cannot sustain this objection in its entirety. It is true that so long as the Commission proceeds in accordance with the requirements of the Commerce Act and its amendments, and with proper regard for constitutional restrictions, its

administrative orders, not calling for the payment of money, if made after due hearing and supported by evidence, are not subject to attack in the courts. This, as we have seen, results from the provisions of §§ 15 and 16 of the act as amended. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 469–470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 297–298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91. But these cases recognize that matters of constitutional right are not to be conclusively determined by the Commission; and we are not prepared to say that a party is debarred from attacking an order of the Commission upon constitutional grounds even though they were not taken in the hearing before that body.

Nevertheless, correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties. This was recognized before the amendment of 1906, and when by §§ 14, 15, and 16 of the original Act of February 4, 1887, c. 104, 24 Stat. 379, 384, as amended by Act of March 2, 1889, c. 382, 25 Stat. 855, the findings made by the Commission upon questions of fact were limited in their effect to that of *prima facie* evidence in all cases and not only, as now, in reparation cases. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 235, 238; *Louisville & Nashville R. R. Co.* v. *Behlmer*, 175 U. S. 648, 675; *East Tennessee &c. Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 27; *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454. The 1906

amendment, in modifying § 14 so as to dispense with the necessity of formal findings of fact except in cases where damages (or reparation) are awarded, and §§ 15 and 16 so as to give a greater effect than before to the orders of the Commission other than those requiring the payment of money, renders it not less but more appropriate that, so far as practicable, all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body. Hence, we cannot approve of the course that was pursued in this case, of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory. Certainly, where the Commission, after full hearing, has set aside a given rate on the ground that it is unreasonably high, it should require a clear case to justify a court, upon evidence newly adduced but not in a proper sense newly discovered, in annulling the action of the Commission upon the ground that the same rate is so unreasonably low as to deprive the carrier of its constitutional right of compensation.

However, the issue is in the case and must be dealt with. In order to show that any rate less than $4.50 would be non-compensatory, the Railway undertook to demonstrate that the full $4.50 would not pay the cost of transportation and yield a just return upon the value of its property. Yet the rates voluntarily established by the Railway prior to the commencement of the present controversy averaged about $4.50 per car, a $4.50 rate was provided for in a tariff issued by the Railway in February, 1913, a uniform allowance of this amount was asked for by it upon the second hearing before the Commission, and the Railway concurred in, and now seeks to maintain, the Cotton Belt tariff which contemplated payment of that rate for its services. Besides, the rate may be compared with $3 per car charged by the Terminal for similar services, $2 per car fixed by city ordi-

nance as the Railway's maximum charge for local shipments between any points on its line, the charge of $1 per car voluntarily established by the Railway for intra-plant movements, 25 cents per car for weighing movements, and the special charge of $1 per car on limited liability, obtaining between the Railway and the Cotton Belt and offered to other carriers. The evidential effect of the Railway's voluntary action is obvious. *Interstate Commerce Commission* v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320, 336.

Moreover, upon the second hearing before the Commission (January, 1912), Mr. Moore, the President of the Railway, testifying in its behalf upon the very point and from a full knowledge of the operations of the company and its property and expense accounts, stated: "The revenue which we are now receiving for all kinds of service performed by the Manufacturers Railway Company is sufficient to pay operating expenses, taxes, rentals, and other fixed charges and 7 per cent. on the investment."

The evidence produced by the Railway before the District Court, while quite inconsistent with these concessions, is adduced as a mathematical demonstration that the $4.50 rate is confiscatory. The principal witnesses were an expert in the valuation of railways, two real estate experts, and Mr. Moore, the President of the Railway. Opinion evidence was relied upon, basing values on estimated cost of reproduction less depreciation, it being stated that the records of the Railway had been kept in such a way as not to show the actual cost. A table was presented ("Summary D") stating the entire value of the property of the Railway on January 1, 1915, at $2,215,353.78, and deductions were made of capital expenditures during the previous eighteen months, in order to show the value as of June 30, 1913, and June 30, 1914. It was attempted to assign to the interstate business a proportion of the total value corresponding to the extent

of its employment in that business. *Minnesota Rate Cases*, 230 U. S. 352, 461. The value of the property as of June 30, 1913, according to the estimates, was $2,086,474.98; and it being found that the interstate car movements during the preceding fiscal year were 79.58 per cent. of the total traffic, an application of this percentage to the total value gave $1,659,227.08 as the proportion of the value of the property, based on use, assigned to interstate traffic for the fiscal year 1913. Operating expenses, taxes, and rentals for the same year were said to amount to $195,628.80, of which 79.58 per cent., or $155,681.39, was apportioned to interstate business. The gross revenue from interstate business for the same year, on the assumed basis of $4.50 per car from all trunk lines on all car interchanges, was calculated to be $217,309.25. Deducting from this the apportioned expenses ($155,681.39) would leave a net revenue of $61,627.86, or only 3.7 per cent. of $1,659,227.08, the value of the property assigned on the basis of use to interstate traffic as of June 30, 1913.

Similar processes showed apparent net earnings of only 1.86 per cent. for the fiscal year ending June 30, 1914, and .77 per cent. for the six months ending December 31, 1914.

The calculations are complex, and we need not reproduce them in detail. We have indicated the outlines, and will analyze the figures only far enough to show that they do not amount to a demonstration.

By way of contrast to the results deduced from opinion evidence concerning values, it should be remarked that Mr. Moore testified in the District Court that at the commencement of his connection with the company in February, 1909, he could only find an apparent book value amounting to $300,899.65, which he believed, however, did not reflect the value of the railway property at that time; and that down to January 31, 1915, there had been improvements and additions to the equip-

ment amounting to $560,008.75, and additions to real estate amounting to $525,349, making a total book value of $1,386,257.40. By deducting $128,878.80 for capital expenditures subsequent to June 30, 1913, we get $1,257,378.60 as the total value on that date, of which 79.58 per cent., or $1,000,621.89, would represent the value assigned to the interstate business according to the formula; and upon this amount the calculated net revenue of $61,627.86 would yield over 6 per cent.

Returning to the calculation relied upon by the Railway, Summary D includes an item "Present Value of Leases, $757,102."

This is the sum of two items, explained as follows: The Railway holds under lease from the Brewery all the lands occupied by its tracks and certain tracks owned by the Brewery within what is described as the "Brewery Zone," bounded by Lynch Street on the north, First Street on the east, Utah Street on the south, and Thirteenth Street on the west, the rental being $24,000 per annum, and the lease having seventeen years to run from January 1, 1915. The real estate experts valued this according to its area in square feet, and by this process arrived at $1,377,853 as its market value. The rental value on a 5 per cent. basis would be $68,892.65. Since by the terms of the lease the lessor was required to pay the taxes, estimated at about $6,000, reducing the net income to about $18,000, this sum was deducted from $68,892.65, leaving $50,892.65 as the annual value of the lease to the Railway for the unexpired term of seventeen years; and the cash value of an annuity of that amount for that term, said to be $573,767, was taken as the capital value of the lease.[1] Again, the Railway

[1] The process is clearly erroneous. Payment of taxes by lessor is for its own account, not for lessee's. Annual cost of leasehold to lessee is measured by gross rental paid, irrespective of what lessor does with the money.

holds certain property in its River Yard under lease from the City of St. Louis at an annual rental of $4,000, expiring October 7, 1934. This property was estimated by the witnesses to be worth $376,309, 5 per cent. of which is $18,815.45, and this amount less $4,000 was taken to be the annual value of the lease, which, capitalized for 19 years, 9 months and 7 days, the unexpired term from January 1, 1915 (date of valuation), gave $183,335 as the value of this lease to the lessee.

We are not convinced that these somewhat speculative valuations of the leaseholds, even if the calculations were otherwise correct, ought to be included in the value of the Railway's property for the present purpose.

The lease from the Brewery includes sidings, tracks, and yards some of which are of special value to the Brewery, but either are inaccessible to the general public served by the tracks of the Railway or are practically monopolized for plant use by the Brewery. The Commission, in its Second Report, 28 I. C. C. 96, described the conditions.[1] The original lease from the Brewery to

[1] The squares bounded by the streets Ninth, Thirteenth, Lynch, and Dorcas; Ninth, Eleventh, Pestalozzi, and Arsenal; and Second, Broadway (Broadway being just south of Seventh), Pestalozzi, and Arsenal are devoted to buildings and yards of the brewery exclusively. Although within these bounded areas there are also others in addition to the three following-named departments, they will, for the sake of convenience, be referred to as the bottling department, Budweiser department, and keg department, respectively. The tracks serving all three of these departments are in and between buildings and sheds of the brewery or in the yards adjoining, and are practically inclosed—on some sides by buildings with passageways between and on the other sides by fences or walls surrounding the yards contiguous to the buildings All of the tracks within these yards are essential to the operation of the brewery except four team tracks in the yards contiguous to the bottling department at Ninth and Dorcas. As bearing upon the accessibility by the public to these various departments, it may be explained that the tracks in the open yard of the bottling department—that is, on the Ninth and Dorcas streets sides—are in-

the Railway, dated December 31, 1908, drew a distinction between tracks and sidings, leasing the former and excluding the latter, as to which, however, it contained this clause: "Said Association further gives and grants to said Railway the right and privilege to use and operate the aforesaid sidings, for railway purposes, upon condition, however, that such use will never interfere with the reasonable use thereof by said Association, of which said Association shall be the sole and only judge." This was made the subject of criticism at the first hearing before the Commission, and in consequence the lease was amended before the second hearing so as to omit this limitation (28 I. C. C. 97). But the evidence tends to show, if it does not render it clear, that certain yards and tracks representing more than one-third of the aggregate value of the leased lands are used almost if not quite exclusively by the Brewery; and raises a question whether some of the other yards, or portions of them, are not, like those mentioned, actually used rather as parts of the Brewery plant than as parts of the transportation system of the Railway.

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closed by an iron fence, on which are displayed "No Thoroughfare" signs, and that the four public team tracks in this yard, referred to, end on the edge of an embankment supported by a concrete wall built up from Ninth street, which is some 10 or 12 feet below, and topped with an iron fence; that the tracks at the Thirteenth street side of this department are ended some 10 or 15 feet below the street level by a stone wall and must therefore be reached by entries from other sides; that the team tracks in the Budweiser yard at Ninth and Pestalozzi are inclosed by a high iron fence with swinging gates; and, likewise, that the 25 or more ladder tracks in the yards of the keg department, beginning at Second and Pestalozzi and running west to Broadway, are ended some 25 feet below the level of Broadway by an embankment which is reënforced by a concrete or stone wall topped with an iron fence. As access to the latter department from the Broadway side is thus absolutely impracticable, entrance must be effected from Pestalozzi street or between buildings of the brewery on the Arsenal street side between Second and Broadway.

The finding of the Commission that the Railway is for the purposes of its decision a common carrier (a finding not now in question), does not have the necessary effect of impressing all of its property with the character of property employed in the service of the public. The Commission recognized that there was a question whether a part of the service performed by the Railway was not a plant-facility service rather than that of a common carrier. 21 I. C. C. 316. And under the peculiar circumstances of the case we prefer to accept the reserved rental of $24,000, voluntarily fixed by the parties most concerned at a time antedating the present controversy, as more reliable evidence of the annual value of the rights conferred upon the Railway as a carrier than the opinions of the experts based upon the theory that by the lease the entire value of the property was devoted to the public use.

The lease from the City to the Railway is not in the printed transcript, but the substance of the ordinance authorizing it is stated. It granted authority to construct, maintain, and operate tracks upon land of which a considerable part constituted a public wharf. If the stipulated rental is less than the fair annual value of the property it is to be presumed that the grant of the excess was to the public, not to the private interest of the Railway. We are at a loss to see upon what principle a presumed annual value of the leasehold in excess of the stipulated rent can be capitalized as assets of the Railway for the use of which in commerce the public is required to pay tolls. This would give to the lease the effect of converting public property, *pro tanto*, into private property.

Deducting the value of the leases, $757,102, from $2,086,474.98, the estimated value of the Railway's property as of June 30, 1913, would leave $1,329,372.98, of which 79.58 per cent., or $1,057,915.02, would represent the value assigned to the interstate business according to the for-

mula; and upon this amount the calculated net revenue of $61,627.86, would yield over 5.8 per cent.

The calculations of revenue and expenses also require revision. The gross revenue from interstate business as stated includes not merely that derived from car interchanges at $4.50 per car, of which in the fiscal year ending June 30, 1913, there were 45,602 cars, producing $205,209; but in addition there were short-haul interchanges, 4,975 cars at the city rate of $2 per car, producing $9,950; inter-plant and intra-plant movements, 1,206 cars at $1 per car, producing $1,206; and weighing movements, 3,777 cars at 25 cents, producing $944.25, making a total of $217,309.25. The evidence renders it clear that the cost of these different movements is not and cannot be segregated; and Mr. Moore himself testified in effect that it costs the same to the Railway to weigh a car upon which 25 cents revenue is received, as to make an intra-plant switch of a car for which $1 is received, or a city movement limited by ordinance to $2, or an interchange delivery for which $4.50 is the rate assumed for the purposes of the test. The plant movements are for the benefit of the Brewery alone, that being the only industry having need for such service; weighing movements likewise appear to be independent of transportation in commerce. The limit of $2 fixed by the ordinance for the city movements seems to have been a part of the consideration for the grant to the Railway of rights in the streets; and on this theory any deficiency of revenue is properly apportionable to the traffic participating in these movements. But as to the other movements, the method of calculation adopted apportions the cost between the different classes according to the revenue derived from each, rather than according to the cost or value of the service.

If the plant and weighing movements—all of the former and three-fourths of the latter being performed for the Brewery—were charged at (say) $2.50 per car instead of the

rates voluntarily adopted, the gain of revenue would be more than $10,000—approximately 1 per cent. upon the entire $1,057,915.02.

The evidence submitted upon the issue of confiscation suggests other questions that need not be discussed or even mentioned; but we must not be understood as accepting what we have not particularly criticized. It is sufficient to say there is a failure to prove that the rate is unremunerative.

Decrees affirmed.

Mr. JUSTICE HOLMES took no part in the consideration or decision of these cases.

DALTON ADDING MACHINE COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 176. Argued March 11, 1918.—Decided April 15, 1918.

A material part of the business conducted in Virginia by plaintiff in error—a foreign corporation—was intrastate, and the company was therefore subject to the licensing power of the State.
118 Virginia, 563, affirmed.

THE case is stated in the opinion.

Mr. Thomas A. Banning and *Mr. Harold S. Bloomberg*, for plaintiff in error, submitted.

Mr. J. D. Hank, Jr., Attorney General of the State of Virginia, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error, an Ohio corporation, complains that the Supreme Court of Appeals of Virginia improperly affirmed an order by the Corporation Commission assessing a fine against it for transacting business in the State without certificate of authority required by law. 118 Virginia, 563. That court adopted and approved the Commission's opinion, which, among other things, declared:

"We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding Machine Company is doing a substantial part of its business in this State in the following particulars:

"(a) In bringing its machines into this State before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this State, after their transportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this State;

"(b) In renting such machines and collecting rents therefor from its customers in this State at will;

"(c) In buying and exchanging machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

"(d) In employing a mechanic in this State and entering into contracts for repairing of machines owned by persons in this State from time to time and collecting the charges therefor;

"(e) In keeping on hand in this State certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agents in Richmond to its customers.

"We think it perfectly apparent that in these particiculars the business of the company in this State is not 'commerce among the States,' the freedom of which is

guaranteed by the United States Constitution, but that such business, in every essential particular, is business which has been transacted by the company in this State in violation of the statutes referred to."

Beyond serious doubt the above specifications concerning the business carried on in Virginia are supported by the record. A material part of it was intrastate.

The judgment of the court below is

Affirmed.

GENERAL RAILWAY SIGNAL COMPANY *v.* COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 177. Argued March 11, 1918.—Decided April 15, 1918.

A foreign corporation, for lump sums, made and performed contracts to furnish completed automatic railway signal systems in Virginia, in the performance of which the materials, supplies, machinery, devices and equipment were brought from without, but their installation, as structures permanently attached to the soil, required employment of local labor, digging of ditches, construction of concrete foundations, and painting. *Held*, that local business was involved, separate and distinct from interstate commerce, and subject to the licensing power of the State. *Browning* v. *Waycross*, 233 U. S. 16.

The Virginia law imposing a fee for the privilege of doing local business of $1,000 on foreign corporations with capital over $1,000,000 and not exceeding $10,000,000 (Acts 1910, c. 53, § 38a), *upheld*, as not arbitrary or unreasonable under all the circumstances, though the case is on the border line.

118 Virginia, 301, affirmed.

500. Argument for Plaintiff in Error.

THE case is stated in the opinion.

Mr. Hugh Satterlee, with whom *Mr. Hiram R. Wood* was on the brief, for plaintiff in error:

Just what did the defendant do in Virginia? It employed there about 20 men—11 signal engineers and experienced men and 9 laborers—for possibly four or five months altogether. They erected iron signal masts about two miles apart and fitted on them alternating current induction motors, signal arms, gears, relays and housings, transformers, line arresters, etc. To reach the rails they dug short, shallow trenches, to an aggregate amount of not over 1,600 feet in a hundred miles. The Southern Railway Company furnished and put up the necessary wooden poles and wires. The defendant's men applied the last coat of paint to the signal apparatus, the first coats having been applied at the factory.

The defendant did these things in Virginia only because it could not do them in New York, and it had no desire or intention to establish its business in Virginia. Because of the nature of the defendant's products it was a complicated, tedious job to install them ready for use, but the defendant was in Virginia for that purpose and no other. It was merely completing a sale to the Southern Railway Company, and it did no business and had no relations with the citizens of Virginia except for hiring a few laborers.

In short, the defendant was doing in the State isolated acts incidental to its manufacturing and selling business conducted in New York. These acts completed, it might or might not ever again have so much as one employee in the State. To force such a casual, occasional entrant to secure a license to do business, continuously to maintain an office, to pay a license tax of $1,000 and an annual registration tax, would be, we respectfully submit, the height of injustice. The very language of the statutes

regulating foreign corporations doing business in the State is manifestly ill chosen to achieve such a result.

This court early decided that single transactions in a State by a foreign corporation, even in the conduct of its ordinary business, did not constitute "doing business." *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727.

Of course, the whole subject of "doing business" is interwoven with the effect of the commerce clause of the Constitution and many decisions assign one ground or the other apparently without much discrimination. More accurately speaking, however, if a foreign corporation is not doing business, there is no need to discuss the commerce clause, while if it is doing business, it may still be relieved from compliance with state statutes if its business be interstate.

A collateral line of cases throws an illuminating sidelight upon this difference. It is held that a foreign corporation is not subject to process in a State unless it is doing business there, but that a corporation may be doing business in a State for the purpose of suit against it, if continuously in the State, while not subject to state foreign corporation laws because engaged in interstate commerce. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

To the same effect are *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218; *Washington-Virginia Ry. Co.* v. *Real Estate Trust Co.*, 238 U. S. 185; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259. But when the corporation is not doing business in the State, service there on its officers is invalid. *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264.

It should not be difficult to perceive the very substantial difference between the position of the Harvester Company, in the above decision, which was continuously in the State by its many agents, engaged in a permanent course of business, and was accordingly held to be doing

business there, although immune from state regulation because its business was interstate, and the position of the General Railway Signal Company, which entered Virginia temporarily for the sole purpose of completing definite sales already made to one customer, and was not doing business there, aside from any application of the commerce clause.

Inability readily to start an action against a foreign corporation is no justification for requiring the registration of such a corporation, unless it be actually doing business in the State and business that is not interstate commerce.

A fortiori, if a corporation is not doing business in a State for the purpose of service of process upon it, it is not doing business for the purpose of the statutes regulating foreign corporations.

In determining whether or not a foreign corporation is doing business in a State, we respectfully but earnestly submit, there are two fundamental questions.

First, is the corporation in the State temporarily or permanently? It is there temporarily if it is making one or more occasional sales, if it is doing one or more definite pieces of work for specified persons. It is there permanently if it maintains an office or a resident force of salesmen in the State. If it is there only temporarily, a further question must be put:

Second, what is the business of the corporation? If the corporation manufactures and sells machinery, for example, at a plant outside the State and enters the State only to make deliveries or to install or erect machinery which from its nature could not be shipped ready for operation, then the corporation is not doing business, *its* business, in the State. If, however, the business of the corporation is contracting or constructing, employing materials which it buys indiscriminately wherever it can, then, wherever it moves its construction plant, it is doing

business, *its* business. The actual *work* in the State that is done by both corporations may be exactly the same, but one may be doing business in the State and the other not. This obvious point, clear from many cases, the courts below missed altogether. See *Buffalo Refrigerating Mach. Co.* v. *Penn Heat & Power Co.*, 178 Fed. Rep. 696.

For several reasons, only one of which needs immediate mention, *Browning* v. *Waycross*, 233 U. S. 16, is no authority for the complainant, and, on the contrary, provides an illustration of our position. The defendant, an individual agent, was convicted under a local ordinance for carrying on the business of erecting lightning rods without a license. As a matter of fact, he *had* carried on the business,—he admitted it,—and no doubt his employer, the foreign corporation, was doing business in Georgia. By every criterion we have advanced that would be so. The foreign corporation was by fair inference permanently and continuously in the State (see our first question above). Whether or not, though doing business, it was subject to a state license tax, is another question. But the present defendant, unlike the defendant or his employer in *Browning* v. *Waycross*, has not been carrying on a continuous course of business in Virginia. *Cf. Williams, Inc.*, v. *Golden & Crick*, 247 Pa. St. 397, and *Delaware River Constr. Co.* v. *Bethlehem & Nazareth Ry. Co.*, 204 Pa. St. 22.

Even if the plaintiff in error were held to be doing business in the State of Virginia, its business was interstate commerce and was protected by the Federal Constitution against state burdens. *International Textbook Co.* v. *Tone*, 220 N. Y. 313; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Stockard* v. *Morgan*, 185 U. S. 27. As it is proper to procure orders in the State, so it is necessary to deliver there the goods ordered. They need not be shipped directly to the purchaser, but may be delivered in any rea-

sonably convenient way. *Caldwell* v. *North Carolina*, 187 U. S. 622; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Western Oil Refg. Co.* v. *Lipscomb*, 244 U. S. 346. The retention of title and possession until payment upon delivery in the State does not rob the transaction of its character as interstate commerce. *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441. Even the exercise in a State of an option to purchase, given in connection with an interstate sale, is protected by the commerce clause if as a practical matter the business is one affair. *Davis* v. *Virginia*, 236 U. S. 697. The right to enforce payment for interstate sales is so essential to interstate commerce as to be protected by the commerce clause. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197. If interstate sales are made from goods kept in a warehouse in the State for shipment from time to time out of the State, no license can be imposed on the seller. *Heyman* v. *Hays*, 236 U. S. 178.

The installation of its signals in Virginia by the plaintiff in error was just as necessary to its interstate commerce as any of the acts within the State involved in the foregoing decisions.

Realizing the difficulty of applying rules to so complex a subject, we yet believe that the solution of the problem can usually be made easy by ascertaining the answers to two further questions, which partly overlap our former.

First, is the essence of the transaction, taken as a whole, the interstate sale or the work done in the State? In other words, which is only accessory to the other? The essence of the transaction is the sale if the corporation manufactures or deals in goods for which it is seeking an outlet. The essence of it is the work done if the corporation is a contractor, having little or nothing to sell but its services.

Second, is the work done in the State reasonably incidental or necessary to the consummation of the interstate sale? Fortunately in our case the answer is clear.

The evidence shows that the signals sold the railway were complex and intricate and required installation by specially trained experts; that they could not be put together before shipment; that the manufacturer's trained employees were best-fitted to install them; that the Southern Railway Company had no signal organization competent to install the signals; and that the installation by the manufacturer was necessary to effect the sale. It is immaterial, therefore, if the General Railway Signal Company had in Virginia twenty employees (as they had), or a hundred,—off and on for a few months (as they did), or continuously for years,—if the plaintiff in error was primarily engaged in selling its signals, and its employees, wherever hired or residing, were engaged in completing such sales.

If, although the contractor furnishes them from outside the State, the materials are readily purchasable in the market and it is only their assembly in a certain manner within the State that alters them from general usefulness and adaptability into the specific structure desired, then it is likely that the work in the State is the essence of the transaction. But if the contractor at its plant outside the State manufactures more or less ordinary materials into definite apparatus, which already has a unique character before its shipment into the State, then the necessary assembly in the State of that apparatus into the completed whole for which it was solely adapted before shipment cannot outweigh the interstate commerce. *Browning* v. *Waycross*, fairly read, is at best no authority for the complainant and actually supports the test questions which we have above suggested.

The imposition of a tax upon the entire capital stock of the plaintiff in error as a condition of its doing intrastate business in connection with its interstate business is repugnant to the Federal Constitution.

The inability of the defendant to perform the work of

installation in Virginia would have prevented or at least seriously embarrassed its confessedly interstate sale to the Southern Railway Company. Permission by Virginia, therefore, only upon a burdensome condition to put together the signals in Virginia would have a very direct effect upon the interstate commerce in which the defendant was engaged.

Assuming that the defendant was engaged in intrastate business in its installation work, yet the State could not impose as a condition of its doing such business, closely and inseparably connected as it was with its interstate business, which admittedly the State could not prevent, a tax upon the defendant's entire capital stock. As above indicated, a tax measured by the proportion of the defendant's capital stock represented by property owned and used in the State would have been proper, which confirms the validity of the defendant's contention that it was not doing business in Virginia, for the proportion of the defendant's capital stock represented by property owned and used in the State is now and always has been zero.

In the installation alone of its signals upon the Southern Railway the plaintiff in error was engaged in interstate commerce. Whoever was engaged in installing the signals in the present case, partly to replace old signals, was engaged in maintaining and improving an instrumentality of interstate commerce, and was consequently engaged in interstate commerce. If the employees were engaged in interstate commerce, naturally the employer was likewise. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, and other cases.

It is true, as indicated in the *Pedersen Case*, that a workman engaged in the laying out of a new railroad or the construction of a bridge in connection therewith is not engaged in interstate commerce. The commerce does not begin until the breath of life is infused into the com-

pleted work, until operation is begun. But the Southern Railway was a road in actual operation. The installation of the signals was a work of maintenance, done in pursuance of the duty of the carrier to correct any insufficiency in its appliances or other equipment. The signal workers were altering and repairing, as in the *Pedersen Case*, a living, pulsating instrumentality of interstate commerce. See *Eng* v. *Southern Pacific Co.*, 210 Fed. Rep. 92; *Chrosciel* v. *New York Cent. & H. R. R. R. Co.*, 174 App. Div. 175.

Whoever does it, the work of installing signals through different States on interstate lines is indissolubly connected with interstate commerce. To hold otherwise would be to permit any State capriciously to prevent the installation of a uniform system of signals along interstate railways, beyond question a matter of national concern.

The Urgent Deficiency Act of October 22, 1913, contained an appropriation to enable the Interstate Commerce Commission "to investigate and report in regard to the use and necessity for block signal systems," and the Commission has repeatedly urged enactment by Congress of a law compelling their adoption. *Cf. Haskell* v. *Cowham*, 187 Fed. Rep. 403, and *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1.

Mr. J. D. Hank, Jr., Attorney General of the State of Virginia, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error seeks reversal of a judgment of the Supreme Court of Appeals of Virginia which affirmed an order of the Corporation Commission imposing a fine upon it for doing business within the State without first obtaining proper authority.

The essential facts concerning business done as found by the Commission and approved by Supreme Court are these:

"The defendant is a corporation of the State of New York, having an authorized capital of $5,000,000. Its principal office and factory is at Rochester, N. Y., where it owns and operates a large manufacturing plant devoted to the manufacture of materials chiefly used in the construction of railway signals which it sells and constructs all over the world. It has a branch factory at Montreal, Canada, and maintains branch offices in New York City, Chicago, and San Francisco.

"By contract dated the fifth day of May, 1914, with the Southern Railway Company, the defendant agreed to furnish certain materials, supplies, machinery, devices and equipment, as well as all necessary labor, and to install, erect, and put in place certain signals and apparatus shown on the plans and described in the specifications, from Amherst to Whittles, Virginia, fifty-eight miles, and to 'complete the entire system and turn same over to the railway company as a finished job,' subject to inspection and acceptance, for $85,597. Similar contracts had been previously made and fully performed, one dated September 6, 1911, covering the lines of the Southern Railway in Virginia from Monroe to Montview, Virginia, thirteen miles, for $16,015, and one dated July 18, 1913, from Orange to Seminary, Virginia, seventy-six miles, for $112,428. The aggregate distance in this State covered by these contracts being 147 miles, and the total consideration being $214,040.

"The purpose of these signals is to promote safety of railway operation and they operate automatically.

"In order to construct these signals as required by the contract it was necessary to employ in this State labor, skilled and unskilled, to dig ditches in which conduits for the wires are placed, to construct concrete foundations,

and to paint the completed structures. The completed structures are along the side of the railway track, about two miles apart, and are twenty-two or twenty-three feet high. In the language of the witness, Moffett: 'It is necessary to erect the signal mechanism, the masts supporting the mechanism, the houses for protecting the relays, reactors, reactants and other similar electrical devices protected from the weather, then the transformers, high tension line arrestors and low tension line arrestors.' The completed structures are permanently attached to the freehold upon concrete bases."

We think the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine announced and applied in *Browning* v. *Waycross*, 233 U. S. 16.

It is further insisted that as the amount of prescribed entrance fee is based upon maximum capital stock it constitutes a burden on interstate commerce, contrary to the Federal Constitution.

Section 38a, c. 53, Acts of Virginia, 1910 (copied in margin) [1] requires every foreign corporation with capital

[1] "Sec. 38a. Every foreign corporation, when it obtains from the State corporation commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia, to be ascertained and fixed as follows:

"For a company whose maximum capital stock is fifty thousand dollars or less, thirty dollars; for a company whose capital stock is over fifty thousand dollars, and not to exceed one million dollars, sixty cents for each one thousand dollars or fraction thereof; over one million dollars, and not to exceed ten million dollars, one thousand dollars; over ten million dollars, and not to exceed twenty million dollars, one thousand two hundred and fifty dollars; over twenty million dollars, and not to exceed thirty million dollars, one thousand five hundred dollars; over thirty million dollars, and not to exceed forty million dollars, one thousand seven hundred and fifty dollars; over forty million dollars, and not to exceed fifty million dollars, two thousand dollars; over fifty million dollars, and not to exceed sixty million dollars, two thousand two hundred and fifty dollars; over

over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the statute shows that prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.

Considering what we said in *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S. 111, the two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper, however, to add that the case is on the border line. See *Looney* v. *Crane Co.*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, *ante*, 135, and *Locomobile Co.* v. *Massachusetts*, *ante*, 146.

The judgment of the court below is

Affirmed.

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sixty million dollars, and not to exceed seventy million dollars, two thousand five hundred dollars; over seventy million dollars, and not to exceed eighty million dollars, two thousand seven hundred and fifty dollars; over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars; over ninety million dollars, five thousand dollars; provided, however, that foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State.

"For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 250. Argued March 27, 28, 1918.—Decided April 15, 1918.

The "28 Hour Law," forbidding interstate railroads from confining animals in cars beyond a certain period without unloading them for rest, water and feeding, unless prevented by accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and subjecting every such carrier who knowingly and wilfully fails to comply therewith to a penalty, must be construed with a view to carrying out its humanitarian purpose, but the exception in favor of the carrier must be given proper latitude and enforced in the light of practical railroad conditions.

If, in the exercise of ordinary care, prudence and foresight, the carrier reasonably expects that, following the determined schedule, the containing car will reach destination, or some unloading place, within the prescribed time, it properly may be put in transit. Thereafter, the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt, to prevent accidents and delays and to overcome the effect of any which may happen, with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

234 Fed. Rep. 268, reversed.

THE case is stated in the opinion.

Mr. Charles A. Vilas, with whom *Mr. William G. Wheeler* was on the brief, for petitioner.

Mr. Assistant Attorney General Frierson, with whom *Mr. S. Milton Simpson* was on the brief, for the United States:

There was excess confinement of 3 hours and 5 minutes. The claim is that there should be deducted from the

actual time 3 hours and 20 minutes of unavoidable delay, leaving the carrier 15 minutes to the good. The fact that there has been an unavoidable delay does not afford exemption if it appears that notwithstanding such delay the carrier could, by proper foresight and diligence, have unloaded within the required time. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 U. S. 336; *Newport News &c.* v. *United States*, 61 Fed. Rep. 480, 490.

The full 3 hours and 20 minutes cannot be counted as excusable delay because, first, at least an hour was inexcusably wasted, and second, at least 28 minutes of it consisted of loss from an accident of such common occurrence that it should have been anticipated. On the carrier's own theory, then, it has failed to account for from ¾ to 1¼ hours. There was evidence warranting the conclusion that, after the accident happened, the carrier needlessly consumed from an hour to 1½ hours in making the rest of the trip. Under the circumstances, the confinement of the cattle for so long a time manifested that disregard of the law or indifference to its requirements which amounts to wilfulness within the meaning of the statute. This case, 234 Fed. Rep. 268, and cases cited; *Spurr* v. *United States*, 174 U. S. 728; *Armour Packing Co.* v. *United States*, 209 U. S. 56.

The exceptions are general and go to a portion of the charge which contains propositions of unquestioned correctness. They, therefore, cannot be considered. *Lincoln* v. *Claflin*, 7 Wall. 132, and other cases. But the portion excepted to is not erroneous.

The carrier was under the double duty to exercise such foresight in laying out and making its runs that, taking into consideration ordinary delays, it could reasonably expect to comply with the law and, after the occurrence of an unexpected delay, to use diligence to minimize the consequences of such delay. After the accident at Proviso, this carrier deliberately wasted at least an hour.

This itself is sufficient to warrant the verdict. In addition, the fair inference from such evidence as the carrier submitted was that 2 hours and 57 minutes actual running or, including 28 minutes resulting from such an accident as is always to be anticipated, 3 hours and 25 minutes, was an unreasonable time to be consumed in running 16 miles and showed a gross want of diligence. But if this inference was not warranted, and even if it appeared that there were conditions on account of which this much time was ordinarily required, the plight of the carrier would be no better. It would still be guilty of wasting an hour at Proviso. And it would be in the position of having exercised such poor foresight in running its train to Proviso as to leave only 3 hours and 12 minutes for a run which would, without even an ordinary accident, require 2 hours and 57 minutes, and which in the event of a drawbar pulling out, a thing always to be anticipated and which did occur, would require 3 hours and 25 minutes and result in a failure to comply with the statute. It would thus stand convicted of a want of both foresight and diligence.

Mr. Justice McReynolds delivered the opinion of the court.

Charging violation of the Act of June 29, 1906, 34 Stat. 607, to prevent cruelty to animals while in transit, the United States sued petitioner for the prescribed penalty and recovered a judgment in the District Court, Northern District of Illinois, which the Circuit Court of Appeals affirmed. 234 Fed. Rep. 268.

The statute forbids an interstate railroad carrier from confining animals in cars longer than thirty-six hours, upon written request, without unloading them for rest, water and feeding "unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and

foresight;" and subjects every such carrier "who knowingly and willfully fails to comply" therewith to a penalty. Admitting continuous confinement for more than thirty-six hours petitioner defended upon the ground that it was prevented from unloading within the required period by exculpatory accidental and unavoidable causes.

It appeared: The animals were loaded at Ringsted, Iowa, four hundred and thirty-eight miles from destination,—Union Stock Yards, Chicago—at six P. M. October 4th, and as part of a train the car containing them left Clinton, Iowa, one hundred and thirty-eight miles from Chicago, at six P. M. October 5th. The ordinary schedule time between the latter points is nine hours, but without increase of actual moving speed the run had been made in about six. While the train was passing through Proviso, sixteen miles from destination, at 2:48 A. M. October 6th, a drawbar came out and derailed a car. A delay of two hours and fifty-two minutes followed—not undue the carrier contends, but unreasonably long the Government maintains. Later, at Brighton Park an air hose burst causing further delay of twenty-eight minutes. The car reached the stock yards at 9:05 A. M. October 6th—thirty-nine hours and five minutes after being loaded.

In its charge to the jury the trial court said:

"Your inquiry has to do with the transportation of this car of stock from the point of origin out in Iowa to destination, Union Stock Yards, and if, on the evidence in this case, you conclude that the Railway Company, by the exercise of due diligence, would have gotten and could have gotten that car of stock from the point of origin to Union Stock Yards inside of thirty-six hours, your verdict should be in favor of the United States and against the defendant, even though you should be of the opinion that these two particular things which have been made the subject of most of the contention here were properly handled by the Railway Company.

"Now, in determining this question you take into consideration the distance, among other things, the distance shown by the evidence from the point of origin to destination, what the evidence shows as to the period of time, thirty-nine hours and five minutes consumed from point of origin to destination, not merely from Clinton to Chicago, the whole movement is here for your consideration and to be considered by you in determining whether or not due diligence has been shown by the carrier.

"Now what is due diligence? Due diligence, as that term is used in this statute means the exercise of foresight bringing to bear on the situation in hand, the transaction in hand, the human intelligence of an average man employed in such business and exercised by a man who has been experienced in railroad business, trained in railroad business so that he knows what should be done in the matter of handling railroads, operating railroads, moving cars,—not merely the movement of an engine, the handling of the throttle by an engineer, not merely the handling of the conductor's work, the brakeman's work or the division superintendent's work, but the whole thing involved in the transaction of operation of the railroad in so far as the movement of this train is concerned, and whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do. Of course it is not the law that a railway company may lay out a slow schedule over a long distance and then if just before they get in to desti-

nation something happens for which they were not prepared or equipped, merely because if that thing had not happened they might have skinned in within the thirty-six limit they are excused; that is not the law."

The statute must be construed with a view to carrying its humanitarian purpose into effect and the exception in favor of the carrier given proper latitude and enforced in the light of practical railroad conditions. Nothing indicates the running schedule was unduly slow; and the jury were improperly given to understand that, conceding matters were properly handled when accidents occurred at Proviso and Brighton Park, they might nevertheless decide the railroad could have got the car to destination within thirty-six hours if due diligence had been exercised in laying out such schedule. The definition of "due diligence" in the charge was too exacting and misleading. As applied to the facts due diligence did not require, as the court declared, that "whatever ingenuity, that is to say whatever human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned, having in mind the movement of trains, the keeping of a railroad open, what human ingenuity could devise, in so far as human intelligence goes, having the benefit of experience, in the way of safe guards and in the way of provision to get stock from origin to destination within the period of this statutory limit, the railroad company has to do."

We find nothing in the act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. If in the exercise of ordi-

nary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused.

In the Hours of Service Act, 34 Stat. 1415–1416, there is a proviso "that the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen. . . ." Construing this, in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 244 U. S. 336, 343, we said: "It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States* v. *Dickson*, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law." This general principle should also be followed in construing and applying the provision of the statute here under consideration.

The judgment below is reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.

UNITED STATES *v.* SCHIDER, TRADING AS "JOS. L. SCHIDER & CO."

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 468. Argued March 6, 1918.—Decided April 15, 1918.

Within the general terms of the Food & Drugs Act (c. 3915, 34 Stat. 768, §§ 7–8), a bottled article labeled "Compound Ess Grape," but which contains nothing from grapes and is a mere imitation, must be deemed adulterated, since some other substance has been substituted wholly for the one obviously indicated by the label, viz., "compound essence of grape," and also misbranded, since the label carries a false and misleading statement.

In such case the mere use of the word "compound" is not a compliance with the proviso in paragraph fourth of § 8 of the act, since it does not give notice that the article is a pure imitation but suggests the contrary.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom *Mr. Chas. S. Coffey* was on the brief, for the United States.

Mr. Joseph S. Rosalsky, with whom *Mr. Jacob I. Berman* was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

An indictment containing six counts charged defendant, Schider, with violating the Food & Drugs Act of June 30, 1906, 34 Stat. 768, by delivering for shipment in interstate commerce food contained in a bottle plainly labeled as follows:

Compound
Ess Grape

Jos. L. Schider & Co.
93–95 Maiden Lane, New York.

Each count alleged the article was an imitation of grape essence artificially prepared from alcohol, water and synthetically produced imitation oils and contained no product of the grape nor any added poisonous or deleterious ingredient; and that the word "imitation" nowhere appeared.

The first count further alleged it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water and synthetically produced imitation essential oils had been wholly substituted for a true grape product, which the article purported to be"; and the second that it was "unlawfully adulterated in that an imitation grape essence artificially prepared from alcohol, water and synthetically produced imitation essential oils, had been mixed with the said article so as to reduce and lower and injuriously affect the quality and strength of the said article."

The third, fourth, fifth, and sixth counts, in varying ways, further alleged misbranding so as to deceive and mislead in that the label indicated a true grape product, whereas the article was not such but an imitation artificially prepared, one which contained nothing from grapes.

The trial court sustained a demurrer to each count upon the view that, properly construed, the Food & Drugs Act did not apply to facts stated.

Pertinent portions of the act follow:

"Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated: . . .

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded: . . .

"First. If it be an imitation of or offered for sale under the distinctive name of another article.

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, . . .

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: . . . Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: . . ." (34 Stat., c. 3915, pp. 768, 770–771.)

The obvious and undisputed purpose and effect of the label was to declare the bottled article "a compound essence of grapes." In fact, it contained nothing from grapes and was a mere imitation.

Within the statute's general terms the article must be

deemed adulterated since some other substance had been substituted wholly for the one indicated by the label; and, also, it was misbranded, for the label carried a false and misleading statement.

Defendant relies on the proviso in § 8 which declares articles of food shall not be deemed adulterated or misbranded if they are "labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale." But we are unable to conclude that by simply using "compound" upon his label a dishonest manufacturer exempts his wares from all inhibitions of the statute and obtains full license to befool the public. Such a construction would defeat the highly beneficent end which Congress had in view.

We have heretofore said: "The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." *United States* v. *Antikamnia Co.*, 231 U. S. 654, 665. "The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality." *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409. And see *United States* v. *Coca Cola Co.*, 241 U. S. 265, 277.

The stuff put into commerce by defendant was an "imitation" and if so labeled purchasers would have had some notice. To call it "compound essence of grape" certainly did not suggest a mere imitation but on the contrary falsely indicated that it contained something derived from grapes. See *Frank* v. *United States*, 192 Fed. Rep. 864. The statute enjoins truth; this label exhales deceit.

The trial court erred in sustaining the demurrer. Its judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

BETHLEHEM STEEL COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 191. Argued March 15, 1918.—Decided April 15, 1918.

Having given bond to secure a contract with the Navy Department, claimant paid premiums after alleged compliance with the condition, and sued to recover the amount, contending that the Secretary of the Navy should have canceled the bond and notified the surety. It not appearing that claimant had bound itself to continue paying premiums until the Secretary so acted, *held*, that the payment was voluntary and gave no cause of action in the Court of Claims.
51 Ct. Clms. 394, affirmed.

THE case is stated in the opinion.

Mr. James H. Hayden for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Bethlehem Steel Company entered into a contract, dated September 27, 1909, with the United States to manufacture and deliver for the Navy large quantities of several groups of armor plates, and agreed to replace any accepted

armor which should prove defective within six months after it had been fastened on the ship. The contract required the company to furnish a bond with sureties in a sum equal to ten per cent. of the total cost of all groups, and provided that "at the end of each calendar year the amount of said bond may be reduced to correspond to the estimated cost of armor then undelivered." The bond was furnished; and delivery of all the armor originally specified was completed May 2, 1911. But on March 26, 1912, plates aggregating at cost prices more than the penalty of the bond were found to be defective, and a part of this was not replaced until November 22, 1912. On January 27, 1912, the company formally requested the Secretary of the Navy to cancel the bond and notify the surety, but he refused to do so except upon certain conditions which were not complied with until May 15, 1912, when the bond was canceled. The company had expended $5,509.62 in payment of premiums on the bond from May 3, 1911, until May 15, 1912, and demanded reimbursement by the Government. Payment being refused, suit was brought in the Court of Claims to recover this amount and also a balance of $3,170.69 for plate delivered. Judgment for the latter sum was entered; but the court held that the company was not entitled to recover for the premiums paid. The case comes here under § 242 of the Judicial Code.

The lower court held that the bond covered merely the original delivery of the armor plate and not the replacement of defective plates; but it refused recovery of the amount paid for premiums after May 3, 1911, on the ground that the payment thereof was voluntary, because the condition of the bond had then been complied with. The Government contends that the bond covered the replacement also; that the contract made reduction of the bond permissive, not mandatory; and that the Secretary was, in any event, under no obligation to cancel the

bond prior to the request made January 27, 1912. We have no occasion to consider any of these contentions. It nowhere appears that the company had bound itself to continue to pay premiums until the Secretary canceled the bond and gave the surety notice thereof. So far as disclosed by the record, the payment of premiums was voluntary. The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE MCKENNA dissents.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* HOLLOWAY, ADMINISTRATOR OF HOLLOWAY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 209. Submitted March 15, 1918.—Decided April 15, 1918.

In an action under the Employers' Liability Act on behalf of the widow of a deceased employee, an instruction that the measure of damages should be such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death, *held* correct, as a general instruction, leaving to the defendant the right to have it supplemented by another indicating that, in estimating the amount of such compensation, future benefits must be considered at their present value.

Under the Employers' Liability Act, defendant is not entitled to have the jury instructed, as matter of law, that the value of money to the beneficiary should be measured by a specific (the legal) rate of interest, or that the duration of future benefits could not have exceeded the life expectancy of the deceased employee, as given by an actuarial table.

Whether the state court has obeyed a local rule of practice requiring

the substitution of correct instructions for defective ones requested, is a question of state law not reviewable by this court in an action under the Employers' Liability Act.

When not based upon an erroneous theory of federal law, refusal of the state court to reverse a judgment upon the ground that the damages are excessive is not reviewable here in an action under the Employers' Liability Act.

168 Kentucky, 262, affirmed.

THE case is stated in the opinion.

Mr. Benjamin D. Warfield, Mr. N. Powell Taylor and *Mr. John C. Worsham* for plaintiff in error.

Mr. Jas. W. Clay, Mr. J. F. Clay and *Mr. A. Y. Clay* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Holloway, a locomotive engineer, was killed on the Louisville and Nashville Railroad while engaged in the performance of his duties. His administrator brought, for the benefit of his widow, an action under the Federal Employers' Liability Act in a state court of Kentucky and recovered a verdict of $32,900. The judgment entered thereon was reversed by the Court of Appeals (163 Kentucky, 125); and, at the second trial, a verdict was rendered for $25,000. Judgment was entered on this verdict, and was affirmed with ten per per cent. damage by the Court of Appeals (168 Kentucky, 262). The case comes here under § 237 of the Judicial Code. The errors assigned in this court and now insisted upon are these:

The first assignment: That the Court of Appeals erred in approving the giving of an instruction and the refusal of another [1] by which the trial judge had denied to the com-

[1] The instruction given was: "The measure of recovery, if you for the plaintiff, being such an amount in damages as will fairly

pany the benefit of the rule declared in *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 491, that in computing damages recoverable for the deprivation of future financial benefits, the verdict should be based on their present value.

The third assignment: That the Court of Appeals erred in refusing to reverse the judgment of the trial court on the ground that the damages were excessive, and in holding as part of the loss of benefits the widow might have received and which the jury was entitled to consider "not only her support and maintenance of $50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated if he had lived out his allotted span" of life.

First: The instruction given, though general, was correct. It declared that the plaintiff was entitled to recover "such an amount in damages as will fairly and reasonably compensate" the widow "for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did not imply that the verdict should be for the aggregate of the several benefits payable at

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and reasonably compensate the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: $50,000.00."

The instruction refused was: "The court instructs the jury that if they shall find for the plaintiff, their verdict cannot, in any event, exceed a sum which will yield, at interest at 6%, a sum which will represent the proven pecuniary benefits which Mrs. Holloway received from her husband in his lifetime, and had reasonable expectation of receiving from him if he had not been killed. And the Court further instructs the jury that the amount so awarded by them should be diminished by such amount as that, by using the interest and a part of the principal sum each year, the principal sum will have been exhausted at the expiration of decedent's expectancy of 28.62 years."

No other instruction on the measure of damages was given; and none was requested, except an instruction, not now insisted upon, limiting the recovery specifically to $13,737.60.

different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate." The language used was similar to that in which this court has since expressed, in *Chesapeake & Ohio Ry. Co.* v. *Kelly*, *supra*, p. 489, the measure of damages which should be applied.[1] The company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction. Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) that money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was 28.62 years,—the life expectancy of the husband according to one of several well known actuarial tables. The company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See *Chesapeake & Ohio Ry. Co.* v. *Kelly*, *supra*, pp. 490–492. Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one (see *Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310, 316), was applicable in the case at bar. That is a question of state law, with which we have no concern.

[1] "The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased."

In the *De Atley Case,* the Kentucky Court of Appeals assumed for the purposes of its decision that the local rule applied, and was thereby led to decide a question of federal law. Consequently we had and exercised jurisdiction to review its decision upon that question.

Second: The third assignment, in so far as it relates to the refusal of the Court of Appeals to reverse the judgment "on the ground that the damages are excessive," is not reviewable here. *Southern Ry. Co.* v. *Bennett,* 233 U. S. 80, 86. It does not appear in the case at bar, as it did in *Chesapeake & Ohio Ry. Co.* v. *Gainey,* 241 U. S. 494, 496, that the action of the Court of Appeals in sustaining the verdict was necessarily based upon an erroneous theory of federal law. As to the alleged error of the Court of Appeals in holding as part of the benefit the widow might have received "not only her support and maintenance of $50.00 a month, but in addition thereto, one-half of the savings, which decedent might have accumulated," it is a sufficient answer that the trial court did not give any instruction on that subject, nor was it requested to give any, and that the Court of Appeals did not hold as stated that the widow could share in the loss to the estate. It held that the pecuniary benefit which the jury was entitled to consider in estimating the widow's damages was not merely what she would have spent for maintenance and support, but what she would otherwise have received from her husband.

Affirmed.

UNITED STATES *v.* SOLDANA ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 325. Argued March 4, 1918.—Decided April 15, 1918.

In view of restrictions and conditions for the protection of the Indians contained in the Acts of May 1, 1888, c. 213, 25 Stat. 113, and February 12, 1889, c. 134, 25 Stat. 660, the grant made by the latter to the Big Horn Southern Railroad Company of a right of way through the Crow Reservation, whether amounting to a mere easement, a limited fee, or some other limited interest, was not intended to extinguish the title of the Indians in the land comprised within such right of way; which, therefore, remains "Indian country" within the meaning of the Indian Liquor Act of January 30, 1897, c. 109, 29 Stat. 506.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States.

No appearance for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Act of January 30, 1897, c. 109, 29 Stat. 506,[1] makes it a criminal offence to introduce intoxicating liquors "into the Indian country." For violating that law, Soldana and Herrera were indicted in the District Court of the United States for the District of Montana. The indictment

[1] This repealed, so far as it was inconsistent, the Act of July 23, 1892, c. 234, 27 Stat. 260, which amended Revised Statutes, § 2139, as amended by Act of February 27, 1877, c. 69, 19 Stat. 244.

charged that the liquor was introduced "within the exterior boundaries of the Crow Indian Reservation" in that State, but upon "the station platform of the Chicago, Burlington and Quincy Railway Company, at the town of Crow Agency" upon the right of way of said railroad. Defendants demurred, contending that the station platform was not within Indian country and that, therefore, no offence was alleged. The District Court sustained the demurrer and discharged the prisoners. The case came here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

Crow Indian Reservation consists of nearly two and a half million acres located in the southwestern part of Montana. The Government agency is at Crow Agency which lies north of the middle of the reservation on the Chicago, Burlington and Quincy Railway, which runs through the heart of the reservation from north to south. The right of way is one hundred and fifty feet wide except where additional ground is allowed for stations. Whether or not the station platform is Indian country depends upon the construction to be given to the act of Congress granting the right of way. If the Indian title to the soil on which the platform stands was extinguished by that grant, the platform was not within Indian country. *Bates* v. *Clark*, 95 U. S. 204.[1] Did the statutes except from the reservation the land on which the railroad was built and extinguish the Indian title, or did they merely give to the company a right of way or other limited interest in the land on which to construct and operate a railroad?

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[1] Other cases giving criteria for determining the meaning of "Indian country" are: *American Fur Co.* v. *United States*, 2 Pet. 358; *Ex parte Crow Dog*, 109 U. S. 556; *United States* v. *Le Bris*, 121 U. S. 278; *Dick* v. *United States*, 208 U. S. 340; *United States* v. *Celestine*, 215 U. S. 278; *Clairmont* v. *United States*, 225 U. S. 551; *Donnelly* v. *United States*, 228 U. S. 243; *United States* v. *Pelican*, 232 U. S. 442; *Pronovost* v. *United States*, 232 U. S. 487.

The statutes to be considered are Act of May 1, 1888, c. 213, 25 Stat. 113, confirming the establishment of the reservation and Act of February 12, 1889, c. 134, 25 Stat. 660, granting a right of way through the reservation to the Big Horn Southern Railroad. Whatever rights it acquired were transferred to the Burlington under Act of March 1, 1893, c. 192, 27 Stat. 529.

The Act of 1888 provided that whenever, in the opinion of the President, public interests require the construction of railroads through any portion of the reservation, the "right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe." The Act of 1889 provided, by § 3, that "the surveys, construction, and operation of such railroad shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision." Section 5 declared that the grant of the right of way was upon the expressed condition that the grantee and its successors "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railroad company under this act."

Whether these acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, *New Mexico* v. *United States Trust Co.*, 172 U. S. 171; *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267; *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44; it is clear that it was not the purpose of Congress to extinguish the title of the Indians in

the land comprised within the right of way. To have excepted this strip from the reservation would have divided it in two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to ensure. The case of *Clairmont* v. *United States*, 225 U. S. 551, which is the basis of the decision in *United States* v. *Lindahl*, 221 Fed. Rep. 143, relied upon by the lower court, involved a statute which extinguished the Indian title.

The judgment of the District Court is

Reversed.

UNITED STATES *v.* WEITZEL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 567. Argued March 7, 1918.—Decided April 15, 1918.

Section 5209, Rev. Stats., punishing embezzlements and false entries by any "president, director, cashier, teller, clerk, or agent" of a national bank, does not apply to a receiver of such a bank, appointed by the Comptroller of the Currency under Rev. Stats., § 5234; he is an officer of the United States and not an agent of the bank.

Statutes creating and defining crimes are not to be extended by intendment upon the ground that they should have been made more comprehensive.

Affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for the United States:

The powers, functions, and duties of a national bank receiver are such as to constitute him an "agent" of the bank, within the broad meaning of that word, as used

in Revised Statutes, § 5209. It should be noted that a statutory receiver of a national banking association is not the officer of, nor appointed by, or responsible to, any court. *In re Chetwood*, 165 U. S. 443, 458. He is appointed by the Comptroller of the Currency to act for the bank, in pursuance of special statutory provisions whence the receiver derives his powers and to which he must look for guidance in the performance of his functions. He is paid out of the funds of the bank; he takes the place of the bank; his signature is the signature of the bank. The efficient liquidation of a bank usually requires considerable negotiation; it may require various contracts which do not immediately operate to liquidate its assets; the receiver conducts many transactions in behalf of the bank while engaged in the general process of liquidation; and in these transactions he may be said to represent the bank and all those who own an interest in the business of the bank. That he acts for the bank, as well as for the creditors, is clear, since in many cases, after payment of creditors, the receiver turns back assets to the bank either for continuance of business by it or for liquidation by an agent chosen by the bank, as provided in the Act of June 30, 1876, c. 156, § 3, 19 Stat. 63. *Bank* v. *Kennedy*, 17 Wall. 19, 22, 23.

The appointment of the receiver does not work dissolution of the bank or affect suits pending against it, or incapacitate it from suing or being sued. Its corporate existence continues after the appointment of a receiver and until its affairs have been finally wound up. *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 7; *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 400.

In *Rosenblatt* v. *Johnston*, 104 U. S. 462, 463, it is said that the bank's "property and assets, in legal contemplation, still belong to the bank, though in the hands of a receiver, to be administered under the law. The bank did not cease to exist on the appointment of the receiver."

A receivership may be of a temporary or provisional nature, and may last only long enough to satisfy the Comptroller that the bank is not insolvent, or that the facts do not present a case for a receiver as provided by the statute. See *Jackson* v. *Fidelity & Casualty Co.*, 75 Fed. Rep. 359, 364.

In *Case* v. *Terrell*, 11 Wall. 199, it was held that the receiver of a national bank represents the bank, its stockholders, and creditors, and that neither he nor the Comptroller of the Currency can subject the Government to the jurisdiction of the ordinary courts to determine the conflicting claims of the United States and other creditors in the hands of such a bank. In the course of the opinion, it was said (p. 202): "He represents the bank, its stockholders, its creditors, and does not in any sense represent the Government." See *Kennedy* v. *Gibson*, 8 Wall. 498, 506.

Revised Statutes, § 5209, was intended to cover the whole ground of defalcations which might be committed by all those who might have any connection with, or control over, the assets, funds, credits, books and papers of a national bank. In the first place, it should be particularly noted that although the National Bank Act was passed in 1863—55 years ago—this case is the first instance, so far as the reports show, in which the contention has ever been raised that an embezzling national bank receiver was not punishable under the act, like any other embezzling representative of the bank. Since it would strain the credulity of the hardiest optimist as to human nature to believe that this is the first instance of a dishonest bank receiver, it would seem that the point would have been taken by some keen attorney during these 55 years "if it had been supposed by anyone that such legislation" failed to provide for such prosecution. *Fairbanks* v. *United States*, 181 U. S. 283, 323.

Embezzlement by a receiver falls squarely within the

evil at which the section was aimed, and the statute should be so construed as to effectuate its evident intent. The statute punishes the acts of three classes of persons: (*a*) president, director, cashier, teller; (*b*) clerk; (*c*) agent. The first class (*a*) are referred to in the section as "officers," for it provides that "every person who with like intent aids or abets any *officer*, clerk, or agent in any violation of this section," etc. These three classes of persons were clearly intended to include every person acting for the bank who would have any control over its funds, credits, books, or papers. See *Commonwealth* v. *Wyman*, 8 Metc. 247, 252; *State* v. *Barter*, 58 N. H. 604, 605; *Wynegar* v. *State*, 157 Indiana, 577, 579, 580; *Clement* v. *Canfield*, 28 Vermont, 302, 304.

The Government contends that the word "agent," in the first line of the section, should, in order to effectuate the full purpose, be given as reasonable a construction as this court gave to the word "agent" in the twelfth line of the same section in *United States* v. *Corbett*, 215 U. S. 233.

The lower court's decision will have this result: That a national bank clerk may be indicted under a statute which affixes a minimum penalty of five years' imprisonment, whereas a national bank receiver may be indicted in a federal court (if at all) only under a statute which contains no minimum penalty and makes it possible for him to escape with a simple fine (Federal Criminal Code, § 97). The Government contends that it is the clear duty of this court to so construe § 5209 as to avoid any such unjust and ridiculous result.

A national bank receiver is not an officer of any court and has not the status of a judicial receiver. He is simply a liquidating agent provided for the bank by the statute. In accepting its charter, the bank accepts all the provisions of the National Bank Act, including the provision for appointment of such a liquidating agent or receiver;

and when such a receiver is appointed as such an agent by the Comptroller, his appointment is impliedly authorized by the bank.

An agent may be constituted either by express act, or by implication, or by ratification, or by acceptance of statutory conditions, or by operation of law. Mechem on Agency, 2d ed., 1914, § 26. A corporation for certain purposes may be conclusively deemed to assent to the appointment by statute of an agent to accept service. It is well-established law that the charter of a corporation embraces the provisions of law contained in the special or general statute under which the organization is formed; and the corporation accepts all such provisions as part of its charter. Each national bank, therefore, impliedly consents to the appointment of such an agent to act for it upon the happening of any of the stipulated contingencies, and it accordingly assents to the authorized acts of such receiver when duly appointed.

The Government contends that the doctrines relative to judicial receivers are not in any way pertinent, and that the text books and cases which state broadly that a judicial receiver is not the agent of the corporation (see *Metz* v. *Buffalo &c. R. R.*, 58 N. Y. 61, 66; *State* v. *Hubbard*, 58 Kansas, 797, 801), do not apply in any way to this statutory bank receiver. If the statute, instead of saying in § 5234, "The Comptroller of the Currency may forthwith appoint a receiver," had said that he might appoint "an agent," or a "superintendent," or a "liquidator," the attempt to apply to such an appointee judicial decisions which referred solely to court receivers would never have been made. *Union Bank of Brooklyn* v. *Kanturk Realty Corporation*, 72 Misc. (N. Y.) 96, 97.

A distinction between a "chancery, or, as it is sometimes called, a common receiver," and a statutory receiver is taken in *Stokes* v. *Hoffman House*, 157 N. Y. 554, 559;

and referred to in *Quincy, Missouri & Pacific R. R. Co.* v. *Humphreys*, 145 U. S. 82, 97.

The functions and duties of a receiver are substantially the same as those of liquidating agent of the bank provided for impliedly under Rev. Stats., § 5220, and expressly under § 3 of the Act of June 30, 1876. Such a liquidating agent and a receiver both represent the bank in its corporate capacity, and act for its benefit. A liquidating agent has been held by the courts to be indictable under Rev. Stats., § 5209.

In *Jewett* v. *United States*, 100 Fed. Rep. 832, it was held that a liquidating agent, who was appointed in voluntary dissolution under § 5220, was an "agent" within the meaning of § 5209. Other statutes, moreover, provide expressly for another liquidating agent, i. e., an agent to be appointed by the shareholders to take over the bank's affairs after the receiver has ended his duties. See Act of June 30, 1876, c. 156, § 3, 19 Stat. 63. Of such an agent it was said, in *McConville* v. *Gilmour*, 36 Fed. Rep. 277: "The 'agent' is only the 'receiver' under another name. . . . Each of these administrative officials—the 'receiver' and the 'agent'—represent the bank in its corporate capacity, and neither of them is more or less than the other such a representative." The same view was taken in *Guarantee Co. of North Dakota* v. *Hanway*, 104 Fed. Rep. 369, 372. A "liquidating agent" appointed by the shareholders is indictable under § 5209 as an "agent." See *Jewett* v. *United States, supra.*

A decision that a receiver is an officer of the United States within the purview of the federal criminal laws will be attended by the following extraordinary results:

First. That from the year 1863 to the year 1879, an embezzling receiver of a national bank could not have been prosecuted under any federal criminal statute; for it was not until the latter year that, by the Act of February 3, 1879, c. 42 (20 Stat. 280; now § 97 of the Federal

Criminal Code), it was first made a crime for an officer of the United States to embezzle any money or property which came into his possession or under his control in the execution of his office.

Second. That from the year 1876 to the year 1879, a liquidating agent of a national bank appointed under the Act of June 30, 1876, § 3, apparently could not have been prosecuted for embezzlement under any federal criminal statute; for *Guarantee Co. of North Dakota* v. *Hanway, supra,* held that such a liquidating agent is an officer of the United States "in every sense in which the receiver is."

Neither the manner of appointment, method of payment of salary, nor duration or tenure of office are such as to constitute a national bank receiver an officer of the United States. His appointment is by the Comptroller of the Currency, and is not required to be approved by the Secretary of the Treasury (Rev. Stats., § 5234); he is paid out of the assets of the bank before distribution of the proceeds (Rev. Stats., § 5238); and he is appointed for no definite time, and for no fixed statutory salary.

Such a receiver clearly does not come within the purview of the term "officer of the United States" as that term is construed in criminal statutes. *United States* v. *Hartwell,* 6 Wall. 385; *United States* v. *Germaine,* 99 U. S. 508, 510; *United States* v. *Mouat,* 124 U. S. 303, 307; *United States* v. *Smith,* 124 U. S. 525, 533; *Martin* v. *United States,* 168 Fed. Rep. 198; *Scully* v. *United States,* 193 Fed. Rep. 185; *United States* v. *Van Wert,* 195 Fed. Rep. 974. *Cf. Thompson* v. *Pool,* 70 Fed. Rep. 725, 727, 728.

The fact that for the limited purpose of suing in the federal courts a national bank receiver has been held to be an officer of the United States, as that term is used in statutes granting jurisdiction to federal courts, is not incompatible with the status of the receiver as an agent

of the bank. To this extent, he acts in a dual capacity. *Kennedy* v. *Gibson*, 8 Wall. 498, 504; *Price* v. *Abbott*, 17 Fed. Rep. 506–508.

It seems clear, however, that the decisions only go to the limited extent of holding a receiver to be an officer of the United States within the meaning of that term in certain special jurisdictional statutes; e. g., Rev. Stats., § 563, cl. 4; § 629, cl. 3; § 380.

There is nothing unusual in one term having two distinct meanings in two different statutes (*Lamar* v. *United States*, 240 U. S. 60, 65); and the best illustration of this fact is to be found in two consecutive cases in 124 U. S., in which in *United States* v. *Mouat*, p. 303, a paymaster's clerk was held *not* to be an "officer of the Navy" within the meaning of the Act of June 30, 1876, c. 159, 19 Stat. 65, whereas in *United States* v. *Hendee*, p. 309, a paymaster's clerk was held to be an "officer of the Navy" within the meaning of the Act of March 3, 1883, c. 97, 22 Stat. 473.

Mr. A. E. Stricklett, with whom *Mr. Jackson H. Ralston* was on the briefs, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the court.

The Comptroller of the Currency is charged with the duty of supervising national banks. When he deems it necessary to take possession of the assets of a bank and assume control of its operations, he appoints a receiver under Rev. Stats., § 5234. Weitzel, so appointed receiver, was indicted in the District Court of the United States for the Eastern District of Kentucky under Rev. Stats., § 5209, for embezzlement and making false entries. That section does not mention receivers, but provides that "every president, director, cashier, teller, clerk, or agent"

of a national bank who commits these offences shall be punished by imprisonment for not less than five nor more than ten years. The Government contended that the receiver was an "agent" within the meaning of the act. A demurrer to the indictment was sustained on the ground that he is not. The court discharged the prisoner and the case comes here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The receiver, unlike a president, director, cashier, or teller, is an officer, not of the corporation, but of the United States. *In re Chetwood*, 165 U. S. 443, 458. As such he gives to the United States a bond for the faithful discharge of his duties; pays to the Treasurer of the United States moneys collected; and makes to the Comptroller reports of his acts and proceedings. Rev. Stats., § 5234. Being an officer of the United States he is represented in court by the United States attorney for the district, subject to the supervision of the Solicitor of the Treasury, § 380. *Gibson* v. *Peters*, 150 U. S. 342. And because he is such officer, a receiver has been permitted to sue in the federal court regardless of citizenship or of the amount in controversy. *Price* v. *Abbott*, 17 Fed. Rep. 506. In a sense he acts on behalf of the bank. The appointment of a receiver does not dissolve the corporation, *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 7; the assets remain its property, *Rosenblatt* v. *Johnston*, 104 U. S. 462; the receiver deals with the assets and protects them for whom it may concern, including the stockholders; and his own compensation and expenses are a charge upon them. § 5238. But a receiver is appointed only when the condition of the bank or its practices make intervention by the Government necessary for the protection of noteholders or other creditors.[1] While the receivership continues the corporation is precluded from

[1] See Rev. Stats., §§ 5234, 5141, 5151, 5191, 5201, 5205, 5208.

dealing by its officers or agents in any way with its assets. And when all creditors are satisfied or amply protected the receiver may be discharged by returning the bank to the control of its stockholders or by the appointment of a liquidating agent under Act of June 30, 1876, c. 156, 19 Stat. 63. Whether, as the Government assumes, such statutory agent who is elected by the stockholders is included under term "agent" as used in § 5209, we have no occasion to determine. The question was expressly left undecided in *Jewett* v. *United States*, 100 Fed. Rep. 832, 840. But the assumption, if correct, would not greatly aid its contention. The law can conceive of an agent appointed by a superior authority; but the term "agent" is ordinarily used as implying appointment by a principal on whose behalf he acts. The fact that in this section the words "clerk, or agent" follow "president, director, cashier, teller" tends, under the rule of *noscitur a sociis*, to confirm the inference. *United States* v. *Salen*, 235 U. S. 237, 249. Furthermore, the term "agent of a bank" would ill describe the office of receiver.

Section 5209 is substantially a reënactment of § 52 of the Act of February 25, 1863, c. 58, 12 Stat. 665, 680, the first National Bank Act. It is urged by the Government, that the punishment of defalcation by a receiver is clearly within the reason of the statute and that, unless the term "agent" be construed as including receivers, there was no federal statute under which an embezzling receiver of a national bank could have been prosecuted, at least until the Act of February 3, 1879, c. 42, 20 Stat. 280, made officers of the United States so liable therefor; and, indeed, cannot now be, because he should not be held to be an officer. The argument is not persuasive. Congress may possibly have believed that a different rule should be applied to an officer of the United States who is selected by the Comptroller for a purpose largely different from that performed by officers of the bank, and who gives bond for the

faithful discharge of his duties. Furthermore a *casus omissus* is not unusual, particularly in legislation introducing a new system.[1] The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a *casus omissus* may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. *Todd* v. *United States*, 158 U. S. 278, 282. *United States* v. *Harris*, 177 U. S. 305.

The judgment of the District Court is

Affirmed.

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[1] For example: 1. Extortion by government "officers": Act of March 3, 1825, c. 65, § 12, 4 Stat. 118 (R. S., § 5481); *United States* v. *Germaine*, 99 U. S. 508; amended by Act of June 28, 1906, c. 3574, 34 Stat. 546, to include "clerk, agent, or employee," and every person assuming to be such officer, etc. 2. Mailing obscene writings: Act of July 12, 1876, c. 186, 19 Stat. 90 (R. S., § 3893); *United States* v. *Chase*, 135 U. S. 255; amended by Act of Sept. 26, 1888, c. 1039, 25 Stat. 496, to include "letters," *Andrews* v. *United States*, 162 U. S. 420. 3. Intimidating witness: Act of April 20, 1871, c. 22, § 2, 17 Stat. 13 (R. S., § 5406); *Todd* v. *United States*, 158 U. S. 278; amended by Criminal Code (1909), § 136, to include witnesses before a "United States commissioner or officer acting as such," as well as witnesses before "courts." 4. Introducing liquor into Indian country: Act of March 15, 1864, c. 33, 13 Stat. 29 (R. S., § 2139); *Sarlls* v. *United States*, 152 U. S. 570; amended by Act of July 23, 1892, c. 234 27 Stat. 260, to prohibit the introduction of "ale, beer, wine, or intoxicating liquor or liquors of whatever kind," as well as "ardent spirits." 5. Perjury: Act of March 3, 1869, c. 130, 15 Stat. 326 (R. S., § 5211; see also R. S., § 5392); *United States* v. *Curtis*, 107 U. S. 671; amended by Act of Feb. 26, 1881, c. 82, 21 Stat. 352, to include false swearing before a "notary public" or "any other officer" properly authorized by the State to administer oaths.

STADELMAN ET AL. *v.* MINER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 644. Submitted January 2, 1918.[1]—Decided April 15, 1918.

Under Jud. Code, § 237, as amended by the Act of September 6, 1916, a final judgment of a state court is not reviewable by writ of error if no treaty or statute or authority exercised under a State or the United States was drawn in question.

An objection that the judgment of a state court ordering sale of real estate denies due process to nonresident parties served by publication, in that the order was made before the service was complete under the state statutes, merely challenges the power of the state court to proceed to a decision, and this does not draw in question the validity of any authority exercised under the State, within the meaning of Jud. Code, § 237, as amended. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162.

Writ of error to review 83 Oregon, 348, 379, 388, dismissed.

THE case is stated in the opinion.

Mr. John M. Gearin and *Mr. Harry G. Hoy* for plaintiffs in error.

Mr. Guy C. H. Corliss for defendants in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The statutes of Oregon provide, that when it becomes necessary to sell real estate of a decedent in order to pay his debts (Lord's Oregon Laws, §§ 1252–1270), the admin-

[1] On January 7, 1918, the case was dismissed *per curiam* for want of jurisdiction, 245 U. S. 636; on March 18, 1918, a petition for rehearing was granted, the former dismissal set aside, and it was ordered that the case stand for consideration under the prior submission, *ante*, 311.

istrator shall file a petition therefor; and that a citation shall issue to heirs known and unknown "to appear at a term of court therein mentioned, not less than ten days after the service of such citation, to show cause, if any exist, why an order of sale should not be made as in the petition prayed for." § 1254. The statutes also provide for the service of unknown or non-resident heirs by publication for "not less than four weeks, or for such further time as the court or judge may prescribe." § 1255.

In 1897 Charles W. Fletcher died intestate in Oregon. His administrator filed in the county court a petition for the sale of the decedent's real estate in order to pay debts; and the citation was ordered to be served upon the unknown or non-resident heirs by publication in a newspaper for four weeks. Publication was made in conformity to the order, the first publication being on June 17, 1902. Under the statute, the state court finds that the hearing on the petition should not have been held before July 24th. It was actually held on July 17th; and an order of sale was then entered by the county court under which the property was sold to Nelson, through whom Miner and Worden claim title by mesne conveyances. The deceased had left surviving two children who were non-residents, Mrs. Stadelman and Henry H. Fletcher. Thereafter, these two and one Motley (a grantee from them of a part interest in the property) brought, in an appropriate state court of Oregon, an independent suit to quiet title and claimed to own the property on the ground that the order of the county court and the sale to Nelson thereunder were void. A decree was rendered by the trial court in their favor; and it was affirmed on appeal by the Supreme Court of the State, where two curative acts were unsuccessfully invoked to sustain the validity of the Miner and Worden title. 83 Oregon, 348, 355. A petition for rehearing was filed; and on January 30, 1917, the Supreme Court reversed its decision and the decree of the lower court and dis-

missed the suit. It held that failure to observe the statutory requirement as to time for hearing was a defect rendering the order voidable merely and not void; that the defect did not operate to deprive the county court of jurisdiction; that the defects could have been availed of only in a direct attack; and that it afforded no basis for a collateral attack, in an independent suit, upon the order and the sale thereunder. 83 Oregon, 379. This conclusion was confirmed by the same court upon a second petition for a rehearing. 83 Oregon, 388.

At the first argument of the case in the Supreme Court of Oregon, plaintiffs contended that to sustain the validity of the sale under the order of the county court would deprive them of their right to due process of law guaranteed by the Fourteenth Amendment (See Memorandum Opinion of this Court, *ante* 311). Upon this contention the case was brought here under § 237 of the Judicial Code. But under that section, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, a final decree of a state court of last resort can be reviewed here on writ of error only in a suit "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." The judgment here involved was entered after the Act of September 6, 1916, took effect. There was not drawn in question the validity of any treaty or statute. And challenging the power of the court to proceed to a decision did not draw in question the validity of any authority exercised under the State. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Ireland* v. *Woods*, *ante*, 323. The writ of error is therefore

Dismissed.

Counsel for Parties.

THOMPSON, ADMINISTRATOR OF THOMPSON, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 184. Argued March 12, 1918.—Decided April 15, 1918.

Section 162 of the Judicial Code, conferring jurisdiction on the Court of Claims in certain cases to determine the claims of those "whose property was taken" and sold under the Abandoned Property Act of March 12, 1863, and amendments, applies only to claims based on ownership at the time of seizure.

Where an owner of cotton sold it to the Confederate Government, accepting Confederate bonds as full payment and agreeing to care for it and deliver it as ordered, and the cotton was seized under the Act of 1863, *supra*, while still in his possession, *held*, that he was neither owner nor lienor, notwithstanding the bonds had become worthless and his vendee insolvent; and that there was no basis for a suit by his administrator in the Court of Claims. *Whitfield* v. *United States*; 92 U. S. 165.

The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.

It is to be presumed that an intention to change the law as declared by this court will be expressed by Congress in plain terms —especially where the matter is very important,—rather than in such as are consonant with and within the scope of this court's previous decision.

Affirmed.

THE case is stated in the opinion.

Mr. William B. King, with whom *Mr. George A. King*, *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* were on the brief, for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a decision by the Court of Claims sustaining a demurrer and dismissing appellant's petition.

The appellant alleges that his decedent on April 28th, 1863, "executed a bill of sale to the Confederate States of America" for seventy-two bales of cotton and received therefor "bonds of the Confederate States Government to the nominal value of $5,500." This bill of sale reads as follows:

"72 Bales; Aggregate Weight 37309 at 15 $5,596.35/100

"State of Mississippi,
County of Copiah:

Pine Ridge, April 28/63.

"The undersigned having sold to the Confederate States of America, and received the value of same in bonds, the Receipt of which is hereby acknowledged, Bales of Cotton, marked, numbered and classed as in the margin, which are now deposited at his Gin House & Shed hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same at his own expense, at Brookhaven, in the State of Miss. to the order of the Secretary of the Treasury, or his Agents, or their Assigns.

J. H. Thompson."

It is further alleged that the appellant has no knowledge as to the disposition made of the bonds received by his decedent and that they became valueless on surrender of the military forces of the Confederate States; that the cotton remained in the possession of his decedent until subsequent to June 30th, 1865, when forty-three of the seventy-two bales were taken from him by United States Treasury agents under warrant of the Act of Congress, approved March 12, 1863, c. 120, 12 Stat. 820, entitled "An Act to provide for the collection of abandoned property" and for other purposes; that the cotton was sold and the pro-

ceeds deposited in the Treasury of the United States, and that "the claimant [appellant] and said decedent have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, that is to say, if any such acts were committed during the late Civil War between the years 1861 and 1865, a full pardon has been granted therefor by the President of the United States."

Upon the facts thus stated the appellant asserts a right to recover the net proceeds of the cotton seized and sold, based upon the terms of § 162 of the Act of March 3, 1911, c. 231, 36 Stat. 1087 (the Judicial Code), which reads as follows:

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

Assuming that the pardon pleaded in the petition and the decisions of this court relieve the appellant of any disability on account of the claimed disloyalty of his decedent (*Carlisle* v. *United States*, 16 Wall. 147) it is clear that he can prevail only if his decedent was the owner of the cotton when it was seized, for the Court of Claims is given jurisdiction to hear and determine only "claims of

those whose property was taken," and this language can have no other meaning.

In the case of *Whitfield* v. *United States*, 92 U. S. 165, it was decided that a sale of cotton, with payment in bonds, under circumstances precisely similar to those we have here, passed title to the Confederate Government without formal delivery, so that the vendor ceased to be the owner of the cotton from the time he accepted the bonds.

It is frankly conceded by the appellant that this decision rules the case at bar and we are asked to reconsider and overrule it on various grounds.

It is argued that, because appellant's decedent in this case (as in that) continued in possession of the cotton until his vendee became insolvent and the bonds given in payment became valueless, he had a lien for the value of it, which constituted him the owner within the meaning of the statute.

The report of the *Whitfield Case* shows that this claim was pressed upon the attention of this court, and that it was rejected for the reason that the bonds were accepted as payment, as fully as if it had been made in money, with all the incidents of such payment. With this conclusion we are satisfied.

It is also argued that Congress, in enacting this section, intended to give a right of recovery to all persons who sold cotton to the Confederate Government, which was afterwards seized by the United States under warrant of the Act of March 12, 1863, referred to, and upon the theory that such sales were void and therefore did not pass title but left the nominal vendors the owners of the cotton, we are urged to so construe the section as to give effect to such supposed intention.

It is asserted that evidence of this intention is to be found in the fact that if not so construed the section will be ineffective and meaningless, because all claims for

property taken from owners under the Act of March 12, 1863, other than for such as was sold to the Confederate Government had been disposed of before its enactment.

Even if the non-existence of other claims for the statute to operate upon were shown, as it is not, by the petition and the attached exhibit, still this contention could not be allowed.

The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. (*Gardner* v. *Collins*, 2 Pet. 58, 93; *United States* v. *Goldenberg*, 168 U. S. 95, 102.)

We have found that § 162, relied upon by appellant, is sufficiently clear in meaning and we cannot doubt that if the Congress had intended by it to change the law, as evidenced by the *Whitfield* decision, of which we must assume that it had full knowledge (*Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 245) it would have done so in plain terms, especially in a matter of such great importance as we have here, and that language would not have been used which, as we have seen, confers jurisdiction upon the Court of Claims only in cases which are clearly consonant with and within the scope of that decision.

It results that the judgment of the Court of Claims must be

Affirmed.

UNITED STATES *v.* WHITED & WHELESS, LIMITED, ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 204. Submitted March 19, 1918.—Decided April 15, 1918.

The provision in the Act of March 3, 1891, § 8, 26 Stat. 1099, that "suits by the United States to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents," was designed for the security of patent titles and does not apply to an action at law to recover the value of patented land as damages for deceit practiced by the defendant in procuring the patent.

A statute of limitations should be strictly construed in favor of the Government.

Where there are two remedies for the protection of the same right, one may be barred and the other not.

The provision in the Act of March 2, 1896, limiting the Government's money recovery to the minimum government price (see 29 Stat. 42, § 2), when patents have been "erroneously issued under a railroad or wagon road grant" and the lands have been sold to *bona fide* purchasers, does not apply to a case in which the Government seeks money damages because of deceit practiced in procuring a patent under the Homestead Law.

232 Fed. Rep. 139, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States:

In the absence of limitation the Government may sue either to annul the patent or to recover the value of the land. The authority of the Attorney General to make this election of remedies results from his general authority to sue in behalf of the United States upon all just grounds that are available to private individuals. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279.

A demonstration of the availability of both these remedies to the Government is found in the fact that where one of them can not be enforced without injury to third parties resort may be had to the other—that is, where the land has passed to an innocent purchaser its value may still be recovered. *Southern Pacific Co.* v. *United States*, 200 U. S. 341, 352. To the same effect are *Cooper* v. *United States*, 220 Fed. Rep. 867, 870; *United States* v. *Koleno*, 226 Fed. Rep. 180, 182; *United States* v. *Frick*, 244 Fed. Rep. 574, 580; *Bistline* v. *United States*, 229 Fed. Rep. 546, 548. The doctrine of these cases is that the right of the Government to sue for the value of the land embraced in a fraudulent patent is not dependent upon but exists independently of the right to sue for annulment of the patent.

The right to recover the value of the land is not affected by the limitation act. There is nothing in the language to indicate an intention to do more than to bar the right to recover the land. To extend it by ordinary implication beyond its plain import would be to disregard the settled rule that the United States "are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville &c. Ry. Co.*, 118 U. S. 120, 125; *United States* v. *Insley*, 130 U. S. 263, 265–266; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554. Examples of restrictive interpretation of this statute are not lacking. *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 367; *La Roque* v. *United States*, 239 U. S. 62, 68; *Louisiana* v. *Garfield*, 211 U. S. 70, 77.

The situation which called for this statute discloses its singleness of purpose. The Act of March 3, 1887, 24 Stat. 556, for the adjustment of land grants, resulted in a large number of suits to cancel patents which had been erroneously issued. This produced a general feeling of

uncertainty respecting the stability of titles to public lands and tended to cast discredit on all public land patents. It was to settle such titles and restore the public faith in patents of the United States that the limitation clause was inserted in the Act of 1891. See House Report 253, 54th Cong., 1st sess. The language of the act is well adapted to accomplish that result, and that result can be fully accomplished without in any manner affecting the right to sue for the value of land procured by fraud.

By appropriate language to meet a different situation Congress might have barred both classes of suits; and this it has done in a specific instance with respect to certain lieu land patents. Act of March 2, 1896, 29 Stat. 42. This is an indication of the understanding of Congress that in order to bar the right to recover the value of land procured by fraud or mistake it is not enough to bar the right to recover the land.

In the confirmation by limitation act of fraudulent patents for the single purpose of settling land titles there is nothing inconsistent with the recognition of continued right to redress on account of the fraud.

A private owner who has been defrauded of his property may, within the limitation period, elect to confirm the transaction and recover the value. He does the same thing in effect when he delays action beyond the time limited by law for recovery of the property, if at that time his right to recover the value be not also barred. In that event, though the title be confirmed, the value may still be recovered. *Lamb* v. *Clark*, 5 Pick. 193, 198; *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 224; *Ivey's Admr.* v. *Owens*, 28 Alabama, 641, 649; *Ganley* v. *Troy City National Bank*, 98 N. Y. 487, 494; *Robertson* v. *Dunn*, 87 N. Car. 191, 194; *Campbell* v. *Holt*, 115 U. S. 620, 625; *Hardin* v. *Boyd*, 113 U. S. 756, 765.

The right of the Government to relief against fraud by every appropriate remedy is not less than that of the

individual. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 279. In a case of fraud, it is entitled to "all the remedy which the courts can give"; *United States* v. *Minor*, 114 U. S. 233, 241; including election between different remedies; *Fenemore* v. *United States*, 3 Dall. 357, 363; and the pursuit of one after another is no longer available. *Southern Pacific Co.* v. *United States*, 200 U. S. 341, 352.

All of the lower federal courts which have had to consider this question, except in the present case, have sustained the right of the Government to sue for the value of land obtained by fraud. after the land itself has been put beyond recovery by the limitation statute. *United States* v. *Jones*, 218 Fed. Rep. 973–975; *s. c.*, 242 Fed. Rep. 609, 616; *United States* v. *Pitan*, 224 Fed. Rep. 604, 609, 610; *s. c.*, 241 Fed. Rep. 364, 366; *United States* v. *Koleno*, 226 Fed. Rep. 180, 182–183; *Bistline* v. *United States*, 229 Fed. Rep. 546, 548; *Union Coal & Coke Co.* v. *United States*, 247 Fed. Rep. 106. It is evident that the decision of the Court of Appeals in this case was founded entirely upon an expression of this court in the case of *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447, 450,— a case readily distinguishable.

The measure of value is not the minimum government price. The offer of the Government to accept $1.25 per acre under the conditions specified in the Homestead Act has no reference to actual value. The conditions themselves imply that the land is much more valuable than the price so fixed. *Pitan* v. *United States*, 241 Fed. Rep. 364, 366; *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170. The Act of March 2, 1896, § 2, relates only to cases where patents were "erroneously issued under a railroad or wagon road grant." *Pitan Case, supra; United States* v. *Frick*, 244 Fed. Rep. 574, 580. To the same effect are *Cooper* v. *United States*, 220 Fed. Rep. 867, 869; and *Union Coal & Coke Co.* v. *United States, supra.*

Mr. T. Alexander, *Mr. A. L. Alexander* and *Mr. J. D. Wilkinson* for defendants in error:

In an action by the United States to recover the value of land, which it alleges was fraudulently procured under a patent at the price of $1.25 per acre, no cause of action or right to recover is disclosed, for the reason that the price received was the price at which it was willing to sell the land and, therefore, it suffered no injury, even conceding the fraud or misrepresentation as alleged to be true. Act of March 2, 1896, §§ 2, 3, 29 Stat. 42; *United States* v. *Norris*, 222 Fed. Rep. 14; *United States* v. *Pitan*, 224 Fed. Rep. 604; *United States* v. *Oregon & C. R. Co.*, 122 Fed. Rep. 541; *Southern Pacific R. R. Co.* v. *United States*, 133 Fed. Rep. 662; *s. c.*, 200 U. S. 354; *Same* v. *Same*, 186 Fed. Rep. 737; Rev. Stats., § 2357.

Injury or damage to plaintiff as a result of fraudulent representation is a necessary prerequisite of recovery in an action for deceit. *Stratton's Independence* v. *Dines*, 135 Fed. Rep. 449; *Srader* v. *Srader*, 151 Indiana, 339; *Emerson* v. *Brigham*, 10 Massachusetts, 199; *Freeman* v. *Venner*, 120 Massachusetts, 424; *Thompson* v. *Newell*, 118 Mo. App. 405.

Suits by the United States to vacate and annul any patent hereafter issued shall only be brought within six years after the date of such patent. Act of March 3, 1891, 26 Stat. 1095.

Statutes of limitation are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. These statutes by the lapse of time become laws of repose protecting parties from prosecution of stale claims, when by the loss of evidence from death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. *Riddlesbarker* v. *Insurance Co.*, 7 Wall. 386; *Campbell* v. *Haverhill*, 155 U. S. 610.

Statutes of limitation, with regard to land at least, are generally held to affect the right, even if in terms only directed against the remedy. *United States* v. *Chandler-Dunbar Co.*, 152 Fed. Rep. 25; *Sharon* v. *Tucker*, 144 U. S. 533; *Davis* v. *Mills*, 194 U. S. 451.

The Act of 1891, as construed by most of the inferior federal courts, bars a recovery of the price of land after the lapse of six years, where the patent was obtained by fraud. *Kansas City Lumber Co.* v. *Moores*, 212 Fed. Rep. 153; *United States* v. *Exploration Co.*, 190 Fed. Rep. 405; *United States* v. *Chandler-Dunbar Co.*, 152 Fed. Rep. 25; *United States* v. *Smith*, 181 Fed. Rep. 545; *United States* v. *Norris*, 222 Fed. Rep. 14; *United States* v. *Whited & Wheless*, 232 Fed. Rep. 139.

This court has in effect held that this statute is a complete bar to any suit of any nature prosecuted after the lapse of such time, for the value of the land or cancellation of the patent. *United States* v. *Winona R. R. Co.*, 165 U. S. 463; *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447.

Where a patent is obtained by fraud, the United States has one cause of action with two remedies to enforce it. When its cause of action is barred by the statute of limitation of 1891, both of its remedies are barred and it cannot resort to either. *Brasie* v. *Minneapolis Brewing Co.*, 87 Minnesota, 456; *People* v. *Michigan Central Ry. Co.*, 145 Michigan, 140; *Auditor* v. *Halbert*, 78 Kentucky, 577; *Jex* v. *City of New York*, 13 N. Y. St. Rep. 545; *Bayles* v. *Crossman*, 5 Ohio Dec. 354; *Wickersham* v. *Lee*, 83 Pa. St. 422.

Mr. Henry McAllister, Jr., by leave of court, filed a brief as *amicus curiæ*, on behalf of the Exploration Company, Ltd.:

While a patent may be directly annulled in a suit brought within six years from its date, nevertheless so

long as it remains uncanceled there is a conclusive presumption that the laws under which it was issued were complied with and that the patentee was lawfully entitled thereto. It cannot be collaterally attacked. *Johnson* v. *Towsley*, 13 Wall. 72, 83; *Steel* v. *Smelting Co.*, 106 U. S. 447, 450; *Noble* v. *Union River Logging Co.*, 147 U. S. 165, 175; *El Paso Brick Co.* v. *McKnight*, 233 U. S. 250, 257; *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 691.

In the light of the principles established by these cases and many others which could be cited, there is but one relief open to the United States with respect to patents issued unlawfully and through fraud, namely, a direct suit in equity to vacate the same. So long as the patent stands it is not merely an instrument of conveyance but there inheres in it an irrefutable presumption that the patentee was qualified, that he acted lawfully in making his entry, and that the Land Department proceeded according to law. This being true, how is it possible for the Government to secure relief by way of damages in the face of a conclusive adjudication of regularity of which the outstanding patent is the final evidence? The case is not analogous to an action for deceit by an ordinary vendor of land against the purchaser. His deed has no effect except to convey title. It does not negative the existence of fraud in its procurement and the vendor may allow the conveyance to stand and sue for damages.

The federal courts which have recently sustained such actions at law by the United States have completely overlooked this vital distinction. *United States* v. *Koleno*, 226 Fed. Rep. 180, 182; *Pitan* v. *United States*, 241 Fed. Rep. 364, 366; *United States* v. *Jones*, 242 Fed. Rep. 609, 615.

The decisions of this court in *United States* v. *Minor*, 114 U. S. 233, and *Southern Pacific R. R. Co.* v. *United States*, 200 U. S. 341, do not conflict with the above views.

In any event after the lapse of six years from the date of the patent no relief can be secured by the Government in any form of action founded on fraud or illegality attending its issue. The statute, as construed by this court, has the effect of barring any proceeding founded upon fraud or illegality in procuring the patent. *United States* v. *Chandler-Dunbar Co.*, 152 Fed. Rep. 25; *s. c.*, 209 U. S. 447, 450; *Louisiana* v. *Garfield*, 211 U. S. 70, 77.

The attitude of the Government in the present case is, in effect, that the Act of 1891 only affects *a remedy*, namely, a suit to annul a patent. If a void or voidable patent is, after the lapse of the prescribed time, "to have the same effect against the United States that it would have had if it had been valid in the first place," *Chandler-Dunbar Case*, *supra*, and if the statute affects the right as well as the remedy, then it indubitably follows that as to any remedy the Government may seek, whether by way of proceedings to cancel or an action for damages, the patent must be treated as though valid in the first instance. Any other construction would permit a collateral attack where a direct attack was prohibited—a practice always frowned upon by courts of equity and of law; it would limit the scope of the statute to the *remedy*—which this court has said may not be done.

It was the intention of Congress that this statute should apply to all forms of action affecting the substance given by the patent. It can make little difference to a patentee, or his grantee (unless the latter is still able to prove innocent purchase notwithstanding lapse of time), whether the Government shall be allowed to take away his *land* or the *value* of his land. For all practical purposes the two are the same. It has been the practice of the Government to treat the title and its value as the same. Act of March 3, 1887, 24 Stat. 556; *United States* v. *Southern Pacific R. R. Co.*, 200 U. S. 341.

This conclusion is alone in accord with the history of

the Act of 1891, and with its practical application and interpretation by the legislative and executive departments of the Government.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover from the liquidating commissioners and the former president of a dissolved corporation the value of public lands described in a patent which it is alleged was procured from the Government by the fraudulent conduct of the company and of its president.

A demurrer to the petition was sustained by the District Court, and this judgment was affirmed by the Circuit Court of Appeals on the ground that the cause of action stated was barred by the statute of limitations, which reads as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." Act of March 3, 1891, § 8, 26 Stat. 1099.

The patent involved was issued on December 12, 1898, and if this case, commenced on December 29, 1914, were one "to vacate and annul" the patent, plainly it would be barred. But this being a suit to recover damages from the fraudulent procurers of the patent, the question presented for decision is, "Does the statutory bar to a suit to annul the patent also bar a suit for the value of the land fraudulently procured to be patented?"

The chief argument in support of the judgment of the lower court is that while the Government before the period of the statute had expired had two remedies, one to annul the patent and one, affirming the patent, to recover the value of the land, yet they were both based on one right, and that when the statute barred the suit to annul, thereby the patent became as valid for the future

as if it had been properly issued and that this cuts off the right, and leaves the Government without further remedy.

This is begging the question. The statute of limitations did not create the right of action in the Government or either of the remedies for enforcing that right. It relates to the remedy, and in terms applies only to one remedy, that for annulling the patent. The right of the Government, asserted in this case, really springs from the fraudulent obtaining of the patent, not from the patent itself, and this right continues until it is satisfied or cut off by statute, and therefore, to say that the barring of one remedy smothers the right to pursue the other, is mere assertion, and does not advance us toward a conclusion as to the effect, if any, which such bar may have upon the other remedy, and the question we are considering remains unanswered, but becomes, What was the intention of Congress, confessedly not clearly expressed, with respect to this issue, when it enacted this limitation statute?

Fundamental to the interpretation of the statute which the answering of this question renders necessary, lies the rule of law settled "as a great principle of public policy" that the "United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound," (*United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125) and also the fact that this principle has been accepted by this court as requiring not a liberal, but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the Government. Thus, in *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355, 367, the limitation in the Act of March 2, 1896, c. 39, 29 Stat. 42, was held not applicable to a patent erroneously issued for Indian lands under a railroad grant, and in *La Roque* v. *United States*, 239 U. S. 62, 68, the general language of the very act we

are considering was held not applicable to a trust patent for Indian reserved lands.

With this rule of interpretation and of practice under it in mind, let us consider the scope of the limitation provision relied upon, which is found in § 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1099, entitled, "An act to repeal timber-culture laws, and for other purposes."

This act is a very considerable amendment to and revision of laws relating to public lands and, as House Report No. 253, 54th Cong., 1st sess., shows, it grew out of the insecurity and loss of confidence of the public in the integrity and value of patent titles to public lands, which had been occasioned by conflicting claims, chiefly between land grant railroad companies and the Government, which had resulted in many suits being commenced to cancel patents. The statute was passed to promote prompt action for annulling patents where cause therefor was believed to exist and to make titles resting upon patents dependably secure when the period of limitation should expire. As might well be anticipated, therefore, this statute, originating in such conditions, was limited in its terms to suits "to vacate and annul" patents, without any reference being made to suits to recover the value of the land when patents were fraudulently obtained, so that only by extravagant interpretation can its bar be made applicable to such suits,—and such interpretation we have seen is forbidden.

To this we add that when the Congress really intended to bar by limitation statute the right to recover the value of lands, as well as the lands themselves, such intention found clear expression in the Act of March 2, 1896, 29 Stat. 42, which modified, and in a measure is a substitute for, the section we are considering, by declaring: "That no suit shall be brought or maintained, *nor shall recovery be had for lands or the value thereof*, that were certified or patented in lieu of other lands," etc.

And finally, the decisions of this court furnish clear confirmation of the reality and substantial character of the contention of the Government, by holding that when by mistake public officers execute a patent to a railroad company for lands which had afterwards been conveyed to purchasers dealing in good faith, the right of the Government to recover such lands was barred, but nevertheless the right remained to sue for and recover the value of the lands so wrongfully received and conveyed. *Southern Pacific R. R. Co.* v. *United States*, 200 U. S. 341, 353.

Thus the rule and practice for interpreting the act, its language, as well that which is omitted from it as that which is contained in it, and the action of Congress in dealing with a kindred subject-matter, all impel to the conclusion that the omission of language barring the right of the Government to recover the value of lands to which a patent had been fraudulently obtained, was intentional and deliberate, to the end that patent titles might be made secure but that persons who had defrauded the Government should not be protected by the act in the enjoyment of their ill-gotten gains.

The support for the contention of the defendants in error, contrary to this conclusion, which they claim to find in *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, is based upon the statement that by the statute the patent "is to have the same effect against the United States that it would have had if it had been valid in the first place." But that is merely an emphatic way of saying that the title is made good. It does not import that the collateral effects of fraud in obtaining the patent are purged. The element of bad faith or fraud was expressly excluded.

While the Circuit Court of Appeals, as we have stated, rested its decision wholly upon the limitation statute, yet, under warrant of the claim in the demurrer that the petition does not state a cause of action, it is further ar-

gued in this court, that if it be conceded that the right of recovery by the Government is not barred, nevertheless such recovery is limited by § 2 of the Act of March 2, 1896, 29 Stat. 42, to the minimum government price for the land, and since the petition shows that this amount was paid to the Government when the patent was issued, there can be no recovery.

But the Act of 1896 deals only with patents "erroneously issued under a railroad or wagon road grant" and the limited recovery allowed is restricted to cases where it shall appear that such erroneously patented lands have been sold to *bona fide* purchasers. That such a statute can have no application to such a case as we are considering is too obvious for comment.

This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in *Lamb* v. *Clark*, pp. 193, 198, it was tersely stated as then familiar doctrine that "If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been." And the principle has frequently been recognized by this and other courts. *Lewis* v. *Hawkins*, 23 Wall. 119, 127; *Hardin* v. *Boyd*, 113 U. S. 756, 765; *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 224; *Ivey's Administrator* v. *Owens*, 28 Alabama, 641, 649; *Ganley* v. *Troy City National Bank*, 98 N. Y. 487, 494.

The conclusions we are here announcing are in entire accord with well considered opinions by two Circuit Courts of Appeal, those of the Eighth Circuit, in *United States* v. *Koleno*, 226 Fed. Rep. 180, and in *Union Coal & Coke Co.* v. *United States*, 247 Fed. Rep. 106, and that of the Ninth Circuit in *Bistline* v. *United States*, 229 Fed. Rep. 546.

The judgment of the Circuit Court of Appeals is

Reversed.

Syllabus.

COMMONWEALTH OF VIRGINIA *v.* STATE OF WEST VIRGINIA ET AL.

PETITION FOR WRIT OF MANDAMUS.

No. 2, Original. Submitted March 6, 1917.—Decided April 22, 1918.

A suggestion now made for the first time by West Virginia, viz., that that State has an interest in an alleged right of Virginia against the United States respecting lands of the Northwest Territory, presents no ground for not enforcing the judgment heretofore rendered.

The judgment heretofore rendered can not now be attacked upon the ground that in original cases in this court one State cannot recover from another in a mere action of debt.

The suit, however, was more than a mere action to collect a debt.

The principle which forbids the production of state governmental inequality by affixing conditions to a State's admission is irrelevant to the question of power to enforce the contract in this case.

The original jurisdiction conferred upon this court by the Constitution over controversies between States includes the power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of a State.

The authority to enforce its judgments is of the essence of judicial power. That this elementary principle applies to the original jurisdiction in controversies between States has been universally recognized as beyond dispute, as is manifested by the numerous cases of the kind which have been decided, in not one of which hitherto, since the foundation of the Government, has a State done otherwise than voluntarily respect and accede to the judgment.

The provision granting this jurisdiction examined as to its origin and purpose, together with the closely related provisions prohibiting interstate agreements without the consent of Congress and depriving the States of army and war-making powers and vesting them in Congress, the result being to show the clear intention of the Constitution, conceived out of regard for the rights of all the States and for the preservation of the Constitution itself, to forestall for the future the dangers of state controversies by uniting with the power to decide them the power to enforce the decisions against the state governments.

To this power the reserved powers of the States necessarily are subordinate.

The powers to decide and enforce, comprehensively considered, are sustained by every authority of the Federal Government, judicial, legislative and executive, which may be appropriately exercised.

The vesting in Congress of complete power to control agreements between States clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from the States.

It follows, by necessary implication, that the power of Congress to grant or withhold assent to such contracts carries with it the duty and power to see to their enforcement when made operative by its sanction.

This power is plenary, limited only by the general rule that acts done for the exertion of a power must be relevant and appropriate to the power exerted.

As a national power it is dominant and not circumscribed by the powers reserved to the States.

The power of Congress to legislate for the enforcement of a contract between two States under the circumstances here presented is not incompatible with the grant of original jurisdiction to this court to entertain a suit on the same subject.

The power of Congress also extends to the creation of new judicial remedies to meet the exigency occasioned by the judicial duty of enforcing a judgment against a State under the circumstances here presented.

Out of consideration for the character of the parties, and in the belief that the respondent State will now discharge its plain duty without compulsion, and because the case is such that full opportunity should be afforded to Congress to exercise its undoubted power to legislate, the court abstains from determining what judicial remedies are available under existing legislation and postpones the case, for future argument upon the following questions: (1) Whether mandamus compelling the legislature of West Virginia to levy a tax to pay the judgment is an appropriate remedy. (2) Whether the power and duty exist to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. (3) Whether, if necessary, the judgment may be executed through some

other equitable remedy, dealing with such funds or taxable property of West Virginia, or rights of that State, as may be available.

Right is reserved in the meantime to appoint a master to examine and report concerning the amount and method to taxation, whether by the state legislature or through direct action, essential to satisfy the judgment, as well as concerning the means otherwise existing in West Virginia which, by the exercise of equitable power, may be made available to that end.

On January 29, 1917, Virginia submitted her motion for leave to file a petition for a writ of mandamus, and for an order directed to the State of West Virginia and the members of her legislature requiring them to show cause why the writ should not issue, commanding the levy of a tax to satisfy the judgment heretofore recovered by Virginia. The motion was granted February 5, 1917, and the rule issued returnable March 6th following. The present decision arose upon the respondents' motion to discharge the rule, submitted on the latter date.[1]

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[1] The Reporter has decided to reproduce the petition and motion, believing that they will add to the future, if not to the immediate, value of the report. He regrets that, in doing this, the attached exhibits and the names of numerous respondents have been perforce omitted, for lack of space. The captions have been left off also. The petition is as follows:

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of the Commonwealth of Virginia by John Garland Pollard, her Attorney General, shows to the Court that:

I.

The Commonwealth of Virginia filed a Bill in this Court on leave on February 26, 1906, against the State of West Virginia, praying that the State of West Virginia's proportion of the public debt of Virginia, as it stood prior to 1861, be ascertained and satisfied.

II:

On June 14, 1915, this Court entered its decree and judgment in the suit as follows:

Mr. John Garland Pollard, Attorney General of the State of Virginia, *Mr. Wm. A. Anderson*, *Mr. Randolph Harrison*, *Mr. John G. Johnson* and *Mr. Sanford Robinson*, for petitioner:

In view of the answer of West Virginia, which stated that it had no property subject to execution, and of its claim

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"SUPREME COURT OF THE UNITED STATES

Original No. 2. October Term, 1914.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, *Defendant*.

"This cause came to be heard on pleadings and proofs, the reports of the Special Master and the exceptions of the parties thereto, and was argued by counsel.

"On consideration whereof, the Court finds that the defendant's share of the debt of the complainant is as follows:

"Principal, after allowing credits as stated, $4,215,622.28; interest from January 1, 1861, to July 1, 1891, at four per cent per annum, $5,143,059.18; interest from July 1, 1891, to July 1, 1915, at three per cent per annum, $3,035,248.04, making a total of interest of $8,187,307.22, which, added to the principal sum, makes a total of $12,393,929.50.

"It is therefore now here ordered, adjudged and decreed by this Court that the complainant, Commonwealth of Virginia, recover of and from the defendant, State of West Virginia, the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum.

"It is further ordered, adjudged and decreed that each party pay one-half of the costs.

"June 14, 1915."

III.

The said judgment and decree has ever since remained and is now unpaid. The State of West Virginia has failed to pay the Commonwealth of Virginia the same, or any part thereof, although payment has been respectfully requested by the Commonwealth of Virginia of the State of West Virginia.

that this court cannot bring about a payment of its decree by the issuance of writ of mandamus or of any other process, the present record presents this question: "If, as the result of a controversy between two States, a decree is entered by this court against one, in favor of the other,

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IV.

The correspondence showing the request of the Commonwealth of Virginia to the State of West Virginia for the payment of said decree and judgment, and the correspondence relating to a proposed joint conference of the Debt Commissions of the two States, as suggested by the West Virginia Commission, are hereto attached and made a part of this petition.

From said correspondence it will appear:

That on October 19, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia, requesting that provision be made for the payment of said decree and judgment.

That on October 28, 1915, the Governor of West Virginia replied that he had convened the West Virginia Debt Commission, and in conjunction with them had reached the conclusion that it would be to the advantage of both States to have a joint conference of the Commissions of the two States at the earliest date possible.

That on November 12, 1915, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, replied, suggesting that the proposed joint conference be held on November 23, 1915.

That on November 12, 1915, the Governor of West Virginia replied by telegram that he would communicate with the members of the West Virginia Commission and would later reply further, which later reply was duly received November 19th, and was to the effect that the West Virginia Commission would probably not be able to have the joint conference, or meeting, before some time early in December, of which he would advise the Virginia Commission later.

That on December 6, 1915, no further advice having been received from the Governor of West Virginia, the Chairman of the Virginia Debt Commission addressed another letter to the Governor of West Virginia, expressing the hope that the Virginia Commission might receive a reply at an early date.

To this letter, addressed on December 6, 1915, to the Governor of West Virginia, no reply has been received.

is the court unable, despite the pecuniary ability of the debtor, to compel payment?"

Past records disclose cases in which municipal bodies have repudiated their sealed obligations; but the State of West Virginia presents, perhaps, the first instance in

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V.

On June 5, 1916, the Commonwealth of Virginia moved the Court to issue its writ of execution directed to the Marshal of this Court against the State of West Virginia, directing the Marshal of this Court to levy upon the property of the State of West Virginia, subject to such levy, for the satisfaction of the decree and judgment in the suit of the Commonwealth of Virginia against the State of West Virginia herein above mentioned, and that the Commonwealth of Virginia be granted such other and further relief in the premises as was just and meet. This Court denied the motion for the reason stated in the opinion of the Court. [241 U. S. 202.]

VI.

The answer and return of the State of West Virginia to the petition and motion of the Commonwealth of Virginia for a writ of execution asserted that the writ of execution prayed for by the Commonwealth of Virginia should not be issued for the following, among other, reasons, and upon the following, among other, grounds:

"Because not only presumptively, but in fact, the State of West Virginia did not, before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was, and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution."

VII.

On November 14, 1916, the Virginia Debt Commission learning that the Governor of West Virginia was about to convene the Legislature of West Virginia in extra session, through its Chairman telegraphed the Governor of West Virginia requesting him to include in the call, to be issued for that purpose, as one of the matters to be considered, the settlement of the decree of this Court rendered in favor of Virginia in the suit of the State of Virginia against West Virginia, to which the Governor of West Virginia replied by telegraph, on November 15, 1916, giving as his reasons for not embodying the matter of the debt settlement in his call, that the time the Legislature would be in session was too short for a proper consideration of the matter, and, in addition,

which one of the great Commonwealths of the Union has repudiated the duty imposed upon it to satisfy a debt decreed to be paid by it.

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that on the second Wednesday of January, 1917, the Legislature would convene in regular session composed, with the exception of hold-over Senators, of newly-elected members to whom, as the Governor thought, the question should be submitted, copies of which telegrams are hereto annexed and made a part of this petition. Thereafter, on or about November, 1916, the Governor of West Virginia issued a call convening the Legislature of West Virginia in extra session, and did not include in said call as one of the matters to be considered, the settlement of the decree of this Court in favor of Virginia in the suit of Virginia against West Virginia. Thereafter, in November, 1916, the Legislature of the State of West Virginia met in extra session and remained in session until December 1, 1916, without giving any consideration in any respect to the settlement of said decree of this Court.

VIII.

On December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia requesting him by a special message to urge upon the Legislature, soon to assemble, the prompt enactment of such legislation as may be requisite to provide the proper means for the liquidation of the decree entered against the State of West Virginia in favor of the Commonwealth of Virginia, and on said December 29, 1916, the Chairman of the Virginia Debt Commission, in pursuance of authority from that body, also addressed a letter to the President of the Senate and the Speaker of the House of Delegates of the State of West Virginia, requesting that the Legislature of the State of West Virginia at its coming session take such steps, and make such enactments as may be necessary to insure the prompt payment of the aforesaid indebtedness, to which letters the Governor of the State of West Virginia replied by a communication dated January 9, 1917, and the President of the Senate replied by communication dated January 11, 1917, respectively, copies of which letters are hereto annexed and made a part of this petition. No reply has as yet been received from the Speaker of the House of Delegates.

IX.

The West Virginia Legislature convened on January 10, 1917, and since that date has been in session at the Capitol in Charleston, West Virginia.

We will not dignify the suggestion of a defense because of an alleged conditional deed delivered in 1783, with notice, for the obvious reason that not only is the claim upon its own face unworthy of notice, but because one State cannot liquidate an indebtedness owing by it to

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The Legislature of the State of West Virginia consists of the Senate and the House of Delegates.

The members of the Senate of the State of West Virginia are Honorables [here follow their names].

The members of the House of Delegates of the State of West Virginia are [here follow their names].

The Honorable Wells Goodykoontz is the President of the Senate, and Honorable Joseph S. Thurmond is the Speaker of the House of Delegates of the State of West Virginia.

X.

It was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the aforesaid Senators and Members of the House of Delegates thereof, to take the necessary steps and make the necessary enactments to provide for the payment of the said judgment of $12,393,929.50, with interest and costs as provided in said judgment, upon the convening of said Legislature on January 10, 1917, but, although respectfully requested to do so by your petitioner, the Legislature and the members thereof have taken no step and have made no enactment to provide for, or insure payment of the aforesaid indebtedness. Nor have any steps been taken by the Legislature, or the Senate, or the House of Delegates to give any indication, or hope that the Legislature will, or intends to make provision for the payment of said indebtedness. On the contrary the Governor of West Virginia, in a special message on the "Virginia Debt," submitted to the Legislature of that State on January 18, 1917, a copy of which is attached hereto, recommended that the Legislature

> "present to the Court a petition for a re-hearing of the matter of the interest upon the debt;"

and further recommended that

> "Provision should be made also by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the State of Virginia sues in the Court of Claims, as I am informed

another State, by setting up a claim that there is an indebtedness owing to it by the United States. Presumably, a claim against a party, thought unworthy of notice, between 1783 and 1910, would not go far in 1917 towards liquidating an indebtedness owing by a second party to a third.

The claim of inability on the part of this court to en-

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she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two States to a common fund, which will place the States in a position to receive their proportionate credits and to end further litigation."

And concluded with the expression of the hope

"that some suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation, and bringing about the consideration of further equities which West Virginia is entitled to receive, and after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be."

XI.

Under the Constitution of the State of West Virginia the session of the Legislature now convened will be adjourned on or before the 24th day of February, 1917, unless, by the concurrence of two-thirds of the members elected to each house, its session shall be further continued beyond said date; and the Legislature must assemble biennially and can not assemble oftener unless convened by the Governor.

In consequence of the time which has already elapsed without any effort being made by said Legislature to perform its duty in the matter of making provision for the payment of the said decree and judgment, there will be insufficient time therefor unless the Legislature promptly, and without further delay performs its said duty.

Your petitioner avers that it is not the intention of the authorities of West Virginia to take any steps by legislation, or otherwise, to make provision for the payment of the said judgment and decree, but that it is the intention to delay making provision for such payment under the pretexts set forth in the letter from the Governor of West Virginia dated January 9, 1917, and in the special message submitted to the Legislature of that State on January 18, 1917, copies of which are hereto attached, until it will be too late for the Legislature of West Virginia now assembled to take any action in the premises.

It is further averred that your petitioner is without remedy in the

force its decree is one of far-reaching importance. If it be sustained, its decrees will be little better than waste paper.

Our contention is, that though a decree may fail of liquidation because of the debtor's lack of funds, it can

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premises unless this Court shall command the Senators and Members of the House of Delegates of the State of West Virginia to assess and levy a tax upon the property in the State of West Virginia to provide for the payment of said judgment and decree according to the terms thereof, as they are in duty bound to do.

WHEREFORE, your petitioner, Commonwealth of Virginia, prays that a rule be made and issued from this Court, directed to the said Honorable Wells Goodykoontz, President of the Senate, Honorables . . . . Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables . . . . Members of the House of Delegates of the State of West Virginia, to show cause why a writ of mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate, Honorables . . . . Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables . . . . Members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said Judgment of $12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent per annum, and costs, according to the terms of said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and for such other and further relief in the premises as shall seem just and meet; and your petitioner will ever pray, etc.

COMMONWEALTH OF VIRGINIA,
By JOHN GARLAND POLLARD,
Attorney General of Virginia.

The motion and return are as follows:

And now come the respondents, the State of West Virginia and Wells Goodykoontz, President of the West Virginia Senate, et al., being all the members of said Senate, and Joseph S. Thurmond, Speaker of the

never thus fail where the debtor is abundantly able to pay and where a body in the State has power to appropriate the State's funds to that purpose.

Upon each of the three great departments of the National Government are imposed duties, and each, either expressly or impliedly, is vested with powers to perform them. The makers of the Constitution, where they im-

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House of Delegates of the State of West Virginia, et al., being all the members of said House of Delegates, and move to quash the rule awarded against them at the prayer of the Commonwealth of Virginia upon the 5th day of February, 1917, ordering them to show cause before this Court on the 6th day of March, 1917, why a writ of mandamus should not issue against them as prayed, and assign as grounds of said motion the following:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

And now, by leave of Court, these respondents, without waiving their motion to discharge said rule, or any of the grounds assigned in support thereof, make further return thereunto as follows:

I. They deny, as charged in the tenth paragraph of the petition of the relator, that it was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the members of her Senate and House of Delegates, upon the convening of said Legislature on January 10, 1917, to take the necessary steps and make the necessary

posed a duty, granted the power to perform it. Owing to the commercial, and other, relations, between the States, it was extremely probable that transactions would arise which would result in indebtedness by one to another. It was therefore, in view of the abandonment of absolute

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enactments providing for the payment of the judgment in favor of the State of Virginia against the State of West Virginia, and described in said petition. On the contrary, they say that their duties in the premises, and under the 8th Section of the 8th Article of the Constitution of West Virginia of 1863, were, and are, not ministerial, but legislative, deliberative and discretionary; and they further say that, instead of omitting or neglecting their duty as charged in the petition, upon the convening of the Legislature on January tenth, or shortly thereafter, the Senate and House of Delegates, each for itself, appointed a committee, with authority to hear arguments, report upon resolutions and recommend appropriate measures looking to the settlement of the judgment rendered at the suit of Virginia against West Virginia, which committees were ready to begin their sittings and to enter upon their work at the time of the presentation of the petition of the relator to this Court; but that since said time, and in consequence of said petition and the rule ordered thereon upon the 5th day of February, 1917, all matters relating to the settlement of said judgment have been suspended and held in abeyance, except that, on the 21st day of February, a joint resolution was adopted by both houses of the Legislature, directing the Attorney General of the State and associate counsel to make appearance and defense, in the name and on behalf of the State of West Virginia and the several members constituting the Senate and House of Delegates thereof, to the rule in mandamus issued herein; and said resolution further provided that, in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon said rule, whether its judgment be for or against the State of West Virginia, the Governor is requested to convene the Legislature in special session as soon as may be for the purpose of doing without delay what should be done in the premises.

A copy of said resolution is filed herewith as a part hereof.

II. Further answering, these respondents say that they are advised that the writ of mandamus is a discretionary writ, and that this Court will exercise its discretion against the issuance thereof if to issue the same would give an undue advantage to the relator, or operate unjustly against the respondents; and they say that it should not be issued in this case for the following reasons:

independence, imperatively necessary that some method should be devised by which the existence of indebtedness could be determined, and its collection enforced. There was but one department by which this result could be attained, *i. e.*, the judicial department.

By Art. III of the Constitution it was required that

These respondents are informed and believe, and upon such information and belief say, that the State of Virginia has a claim against the Government of the United States for many millions of dollars, which should be collected, and, when collected, that the State of West Virginia should participate therein in the same ratio that she, the State of West Virginia, is compelled by the judgment of this Court to contribute to the payment of Virginia's *ante bellum* debt; that is to say, she should be paid out of said claim by the State of Virginia 23½% thereof.

And they further say that they are advised that the State of Virginia alone can take steps for the collection of said claim, and are informed that Virginia has taken no such steps, but has to the present time withheld, and still withholds, from any effort to reduce this common asset to possession, and yet seeks to compel the State of West Virginia to pay her proportion of the common debt, and thus denies her the opportunity to share in the common assets.

They further say that the equity aforesaid was not passed upon by this Court in the settlement of the controversy between Virginia and West Virginia, and could not have been, because the United States was not a party thereto, and could not have been, but that the State of Virginia could have theretofore impleaded the United States in the Court of Claims upon the claim aforesaid, and reduced the same to possession, so that West Virginia could have asserted, and this Court could have allowed, her right to participation therein, but she did not, but then failed and refused, and still fails and refuses, so to do.

These respondents further say that the origin, nature and history of the claim aforesaid is as follows:

Prior to the adoption of the articles of confederation entered into by the thirteen original States, Maryland refused to sign the same, unless and until those States holding western territory should surrender the same to the United States. The State of Virginia at the time laid claim to all that territory lying northwest of the Ohio River out of which the States of Ohio, Indiana, Illinois, Michigan, Wisconsin and a portion of Minnesota have since been formed; and, by an Act of her General Assembly passed at a session commencing on the 20th day of

there should be one Supreme Court, though it was permitted to Congress, from time to time, to ordain and establish inferior courts. It was provided that the judicial power should extend to many enumerated cases and: "2. To controversies between two or more States." If the con-

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October, 1783, and for the purpose of expediting the establishment of the proposed confederation, authorized her delegates in Congress to convey to the United States in Congress assembled all her territory northwestward of the Ohio River, and, on the first day of March, 1784, her delegates in Congress, consisting of Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, and pursuant to the Act of October 20, 1783, presented a deed to Congress ceding all the territory of Virginia northwestward of the Ohio River to the United States, upon certain terms, conditions and trusts therein set forth, which deed of cession was accepted according to its terms, and directed to be recorded and enrolled among the Acts of the United States in Congress assembled. Among the conditions set out in the deed and accepted by Congress was the following:

> "(F) That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the beforementioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It further appears from the requisitions made by Congress upon the thirteen States at the time of this cession that Virginia's "usual respective proportion in the general charge and expenditures" was about one-seventh of the whole; and it seems to be also conceded that the moneys derived from the sale of the lands embraced in this cession were to be applied to the extinguishment of the public debt incurred in the War of the Revolution, which debt was finally paid; so that, after this part of the trust had been met, and certain other conditions of the deed had been performed, the residue of the trust fund should have been applied to the reserved interests of the States set forth in Article (F) of the deed, Virginia included, and to "no other use or purpose whatsoever." In-

tention of West Virginia be sustained, this clause created not "judicial *power*," but "judicial impotence." The power conferred over controversies between two or more States was conferred in precisely the same way that power was conferred over controversies "between citizens of

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stead of doing this, however, Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms.

The total acreage embraced, according to government surveys, in the cession amounted to 170,208,613 acres, and out of this Congress seems to have donated to local uses, contrary to the deed, 38,864,189 acres, which, valued at $2 per acre, the price fixed by Congress when these lands were offered for sale by the Act of May 18, 1796, would amount to $77,728,378. In addition to this, proceeds of the sales of lands amounting to $2,953,654.70 were likewise donated to local uses, making an aggregate of donations contrary to the deed of $80,682,032.70.

In addition to this, their information is that the trust has not even yet been entirely administered, but that there remains on hand undisposed of several thousand acres of these lands; and, not [now?] adding the value of these to the value of the local donations above ascertained, and allowing unto Virginia one-seventh thereof as her residuary interest in the trust, there would be due and payable from the Government of the United States to the State of Virginia the sum, at the least, of $12,000,000, in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt; that is to say, she should receive 23½% thereof.

The foregoing epitome of said claim is based upon information and belief, and, in support thereof, a copy of the message of Governor Swanson of Virginia to the General Assembly of that State, and dated January 24, 1910, is exhibited herewith as a part of this return.

WHEREFORE, said respondents, and each of them, pray that said rule may be discharged, and the peremptory writ of mandamus denied.

STATE OF WEST VIRGINIA,

[Here follow the signatures of the individual respondents.]

By E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

[Verification]

different States" or "between a State and citizens of another State."

We are, therefore, in the present controversy, presented with a case in which the court proceeded because judicial power so to do had been expressly vested in it by the Constitution of the United States. It was necessary for it to enter its decree in favor of the plaintiff or of the defendant. The decree which was entered was in the performance by this court of a duty imposed upon it.

Can it possibly be that nothing more was intended by the Constitution than that this court should go through the useless, and meaningless, work of merely making a suggestion to the State of West Virginia that it owed to the State of Virginia a designated amount of money, which it would be right for it to consent to pay? Would such a proceeding, thus ending in naught, have been in exercise of "judicial power"?

When jurisdiction was given to this court, in controversies between citizens of different States, and in cases of admiralty, and in controversies to which the United States should be a party, it was not deemed necessary to prescribe the process of execution or command which would compel performance of its decrees. With the grant of the power went, by necessary implication, the ability to exercise it in usual methods. It may well be that this court has no power, itself, to levy a tax. This power rests in the legislatures of the different States. There are several cases in which this court has said that of itself, and by itself, it has no such power of tax assessment. What it does possess, however, is the power to coerce the performance by the legislature of a duty necessary to be performed, in order to effectuate its decrees.

Rees v. *Watertown*, 19 Wall. 107, and *Meriwether* v. *Garrett*, 102 U. S. 472, relate to the judicial inability to levy taxes directly, not questioning the power to compel their levy in proper cases by those who are authorized

to do so. *Cf. Supervisors* v. *United States*, 4 Wall. 435; *Heine* v. *Levee Commissioners*, 19 Wall. 655.

In *Louisiana* v. *Jumel*, 107 U. S. 711, the bondholders' right was denied because of their inability to sue the State. The court however said: "When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose."

There is no magic in the word "sovereignty," where a State had been subjected to a decree by this court to pay an indebtedness. The power of this court in all cases in which it has jurisdiction over a State, is necessarily supreme. There is no practical difference in the degree of power to be exercised in ordering municipal officers to levy a tax to pay a judgment against the municipality, and in requiring a state legislature to make such a levy in a case like this. The remedy which is asked for in this case is one which is always pursued in the case of a governmental body, municipal or otherwise, which is indebted and which fails to pay or is unable to pay under execution.

In the present case, West Virginia has no funds which can be seized. All its property is in public use. It is, however, a very prosperous Commonwealth, abundantly able, by taxation, to liquidate all its indebtedness.

Its legislature is vested with an unrestricted power to levy taxes to meet its liabilities.

This court cannot compel the exercise of discretion in a legislature; but it can compel the performance of a duty where such performance is necessary, in order that its decrees may not be treated as idle words. It is the duty of the legislature to levy taxes sufficient to meet its indebtedness. There is no pretense in any of its pleadings

that it cannot, by taxation, procure amply sufficient means.

Mandamus is a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, it becomes a substitute for the ordinary process of execution to enforce the payment of the same. *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Riggs* v. *Johnson County*, 6 Wall. 166; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Labette County Commissioners* v. *Moulton*, 112 U. S. 217.

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of a mandamus is to be determined. *Kendall* v. *United States*, 12 Pet. 524, 617; *Marbury* v. *Madison*, 1 Cranch, 137, 170.

This court has taken jurisdiction of this case and jurisdiction includes the power to enforce the execution of what is decreed. Blackstone (Cooley's ed.), p. 242; *Riggs* v. *Johnson County*, 6 Wall. 166, 187.

As we have said, the legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the court to be due. The obligation to do so is part of the contract upon which the judgment is founded. See § 8, Art. VIII, of the Constitution of West Virginia, which became operative and was in force when she was admitted into the Union on June 20, 1863; and also the opinion of the court, per Mr. Justice Holmes, in *Virginia* v. *West Virginia*, 220 U. S. 1, 30.

Should the legislature see fit to raise the money by creating a bonded indebtedness, it may thus save the necessity of a large immediate levy. Its primary duty, however, is to pay the debt, and the only discretion conferred upon it is to determine whether it will pay it by exercising one power or another. Its duty is to exercise a power which will force payment. The issue raised by

West Virginia as to the judicial power to use an ordinary judicial remedy to enforce a judicial decree, is most momentous. The question, however, seems to us, though we state the fact most respectfully, one not difficult of solution.

Mr. E. T. England, Attorney General of the State of West Virginia, and *Mr. John H. Holt,* for respondents:

A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State to enact a revenue law, or to lay a tax for state purposes, would infringe upon the rights of the States expressly reserved by the Tenth Amendment to the Federal Constitution.

The power of laying taxes for state purposes nas not been "delegated to the United States by the Constitution, nor prohibited by it to the States," and, in consequence, this power has been "reserved to the States." It was never contemplated that the States would lay levies for national purposes, or that the Federal Government would lay them for state purposes. On the contrary, we have, under the Constitution, two distinct powers of taxation, the one for federal, and the other for state purposes; and it is exercised, in the one case, exclusively by the Federal Government, and, in the other, by the State. Neither may encroach upon the other. Otherwise, there would be an irreconcilable conflict between an indestructible Union, upon the one hand, and equally indestructible States, upon the other. It is true that one State may not destroy the Union, but it is equally true that the Union may not destroy one State. In addition to this, the power of taxation in each government is lodged in the legislative department thereof, and may not be exercised by the judicial department of either government in any case.

What, then, is the character and the purpose of the particular tax that it would be sought to levy by the writ

of mandamus prayed? Clearly it is a state tax, to be devoted exclusively to a state purpose; that is to say, to the payment of a state debt, and is such a tax as may be authorized, in consequence of the Tenth Amendment, only by the state government. It involves one of the expressly reserved sovereignties of the State, and this express reservation may not be overturned by an antecedent implication that the power to decide necessarily embraces the power to execute. The conclusion, therefore, would seem to be irresistible that the Federal Government cannot, through its judicial or any other department, coerce a State in the exercise of its reserved powers by compelling the legislature thereof to exercise such powers contrary to its discretion, and in opposition to its will. The existence and exercise of such a power would overturn the Tenth Amendment, and make serious inroads upon the fundamental rights of the States. In other words, the provision contained in § 2 of Art. III, of the Constitution, giving the Supreme Court original jurisdiction "in all cases . . . in which a State shall be a party," if it should have added to it, by inference or argument, and as an incident to such jurisdiction, the power to enforce a judgment rendered in any such case through the medium of a writ of mandamus controlling the legislative action of a State in respect to its reserved powers, would render the subsequently adopted Tenth Amendment abortive.

In the case of *South Dakota* v. *North Carolina*, 192 U. S. 286, Mr. Justice Brewer, in delivering the majority opinion of the court, speaks of "the absolute inability of a court to compel a levy of taxes by the legislature"; and the foregoing conclusion is further strengthened by the opinions of this court, speaking through Mr. Justice Miller, in the cases of *Heine* v. *Levee Commissioners*, 19 Wall. 655, and *Rees* v. *Watertown*, 19 Wall. 107.

To like effect is *Meriwether* v. *Garrett*, 102 U. S. 472, and

the reasoning of this court in *Kentucky* v. *Dennison*, 24 How. 66. See also *Carter* v. *State*, 42 La. Ann. 927.

Jurisdiction to hear and determine may, and does ordinarily, include the power to enforce (or rather the power to issue proper writs for the enforcement of a judgment); but mandamus cannot, under the Constitution, become a substitute for a writ of execution upon a judgment against a State. Execution may be issued upon a judgment regularly rendered against a State, and be levied upon any property owned by the State, and not devoted to political or governmental purposes, and, if no such property be found, the writ must be returned *nulla bona*, and the end of the law has been reached, because, as we have seen, the legislative department of a State may not be coerced, under the Constitution; and there is nothing remarkable in this situation, because frequently judgments are rendered and executions issued thereon which are returned *nulla bona*, and all legal remedies thereby exhausted. The courts can only give suitors the proper process, original and final, and, if these fail to satisfy the creditor's claim, there is no fault in the judiciary. In other words, jurisdiction does not include or imply the collection or satisfaction of a debt, but only means the power to hear and determine, and to render judgment therefor and issue proper process thereon.

Cases in which subordinate agencies of a State have been compelled by mandamus to levy taxes in accordance with their duty under the state law throw no light on the situation.

Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State. At common law, Parliament never was, and could not be, coerced by the writ of mandamus. *People* v. *Morton*, 156 N. Y. 136. And, in this country, the same principles and usages have always obtained. *Ex parte Echols*, 39 Alabama, 698;

State v. *Bolte*, 151 Missouri, 362. Certainly such is true with respect to the mandamus of state legislatures by state courts, and there is no case on record where this court has ever addressed a writ of this character to the law-making power of a State.

We are not unmindful of the dangers and difficulties of analogy; but, if this were the case of an individual judgment debtor, it is plain that, after a writ of execution had gone against him and been returned *nulla bona*, and after it had been ascertained, in addition thereto, that he had no real estate out of which to satisfy the judgment, although he might have great earning capacity, no one would contend that the exercise thereof might be compelled by the writ of mandamus. He might be able to sing or dance, and even be bound by contract to do both, and yet he would not be compelled to do either. *Lumley* v. *Wagner*, 1 De G., M. & G. 604.

It may be answered that a fund was created by mandamus for the payment of a debt in the case of *Supervisors* v. *United States*, 4 Wall. 435, and like cases. But it will be observed that in each of those cases all necessary legislative action had theretofore been had, and the proper ministerial agents appointed for the effectuation thereof; so that nothing was left to be done except to have resort either to the state or federal courts for a writ of mandamus to compel the performance of a purely ministerial act; made mandatory by the act of the only branch of government having any discretion in the premises.

Section 8 of Art. 8 of the West Virginia constitution of 1863 imposed no ministerial duties upon the legislature of the State, but only judicial and legislative duties. We come back, therefore, to the question whether or not this court can or will interfere by mandamus to coerce the action of a state legislature in the performance of purely legislative functions within its exclusive jurisdiction, and this, it is submitted, this court will not do, for the same

reason, among others, that it refused in the case of *Louisiana* v. *Jumel*, 107 U. S. 711, to oust the political power of the State of Louisiana of its jurisdiction, and set the judiciary in its place.

It should be further observed that the petition prays for a mandamus commanding the legislature to assess and levy a tax to provide for the payment of the judgment unless the legislature shall provide for the payment by bonds. This not only illustrates, but actually invokes, the discretion of the legislature, and does not at that embody all of its discretionary power when measured by the constitutional provision invoked. The legislature could perhaps under the state constitution, either (1) lay a tax upon all property, real and personal, within the State, to be collected at once, sufficient to pay the judgment, or (2) it might, under that constitution distribute the tax over a period of years, or (3) it might resort to a bond issue, which would be governed either by § 8 of Art. 8 of the constitution of 1863, or by § 4 of Art. 10 of the present constitution.

If under the former, a sinking fund would have to be provided "sufficient to pay the accruing interest and redeem the principal within thirty-four years"; that is to say, the period of payment might be short or long, either one year or thirty-four, within the discretion of the legislature. And if under the latter, payment would have to be "equally distributed over a period of at least twenty years"; that is to say, the annual contributions to the sinking fund would have to be equal for a period of twenty years or more, again at the discretion of the legislature. In any event, the wide discretion of the legislature is illustrated; and it should be further borne in mind that that body is composed of two houses, one of which might deem its discretionary duty to lie in one direction, and the other in another, and yet the two must concur in order to lay a levy or issue bonds.

Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

The matter set up in the return of the respondents relative to the cession of the Northwest Territory is an appeal to this court to exercise its discretion against the issuance of the writ herein, under all the circumstances.

If a controversy arises between two States involving a question of boundary, this court applies to the solution of the controversy all the machinery and flexible orders of a court of equity, resulting in the appointment of commissioners for the purpose of ascertaining and monumenting the true boundary, followed by a final decree that extends the jurisdiction of one commonwealth to the line so established, and excludes the jurisdiction of the other from the territory thus covered; and may give final effect to this decree in a thousand and one ways, the particular way being dependent upon the character of the judicial questions that may subsequently spring thereout.

Again, in the event of a final judgment against a State upon bonds issued by her and owned and held by another State, if there be collateral to secure the payment, there is no more difficulty in subjecting it to satisfaction of the judgment than there would be in the case of an individual, and such was the conclusion of this court in *South Dakota* v. *North Carolina*, 192 U. S. 286.

Likewise, in the case of a mere money judgment, the writ would be one of the ordinary writs of execution, and would take its course as in the case of an individual; and the exercise of judicial power involves nothing more. It neither contemplates nor promises the unusual or the forbidden, and incompetence may not be predicated upon such a situation by any one.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

A rule allowed at the instance of Virginia against West Virginia to show cause why, in default of payment of the judgment of this court in favor of the former State against the latter, an order should not be entered directing the levy of a tax by the legislature of West Virginia to pay such judgment, and a motion by West Virginia to dismiss the rule is the matter before us.

In the suit in which the judgment was rendered, Virginia, invoking the original jurisdiction of this court, sought the enforcement of a contract by which it was averred West Virginia was bound. The judgment which resulted was for $12,393,929.50 with interest and it was based upon three propositions specifically found to be established: First, that when territory was carved out of the dominion of the State of Virginia for the purpose of constituting the area of the State of West Virginia, the new State, coincidently with its existence, became bound for and assumed to pay its just proportion of the previous public debt of Virginia. Second, that this obligation of West Virginia was the subject of a contract between the two States, made with the consent of Congress, and was incorporated into the constitution by which West Virginia was admitted by Congress into the Union, and therefore became a condition of such admission and a part of the very governmental fiber of that State. Third, that the sum of the judgment rendered constituted the equitable proportion of this debt due by West Virginia in accordance with the obligations of the contract.

The suit was commenced in 1906 and the judgment rendered in 1915. The various opinions expressed during the progress of the cause will be found in the reported

cases cited in the margin,[1] in the opinion in one of which (234 U. S. 117), a chronological statement of the incidents of the controversy was made.

The opinions referred to will make it clear that both States were afforded the amplest opportunity to be heard and that all the propositions of law and fact urged were given the most solicitous consideration. Indeed, it is also true that in the course of the controversy, as demonstrated by the opinions cited, controlled by great consideration for the character of the parties, no technical rules were permitted to frustrate the right of both of the States to urge the very merits of every subject deemed by them to be material.

And, controlled by a like purpose, before coming to discharge our duty in the matter now before us, we have searched the record in vain for any indication that the assumed existence of any error committed has operated to prevent the discharge by West Virginia of the obligations resulting from the judgment and hence has led to the proceeding to enforce the judgment which is now before us. In saying this, however, we are not unmindful that the record contains a suggestion of an alleged claim of West Virginia against the United States, which was not remotely referred to while the suit between the two States was undetermined, the claim referred to being based on an assumed violation of trust by the United States in the administration of what was left of the great domain of the Northwest Territory—a domain as to which, before the adoption of the Constitution of the United States, Virginia at the request of Congress transferred to the government of the Confederation all her right, title and interest in order to allay discord between the States, as New York had previously done and as Massachusetts, Connecticut, South Carolina, North Carolina and Georgia

[1] 206 U. S. 290; 209 U. S. 514; 220 U. S. 1; 222 U. S. 17; 231 U. S. 89; 234 U. S. 117; 238 U. S. 202; 241 U. S. 531.

subsequently did.[1] It is obvious that the subject was referred to, in connection with the duty of West Virginia to comply with the requirements of the judgment, upon the hypothesis that if the United States owed the claim, and if in a suit against the United States recovery could be had, and if West Virginia received its share, it might be used, if sufficient, for discharging the judgment, and thus save West Virginia from resorting to other means for so doing.

That judicial power essentially involves the right to enforce the results of its exertion is elementary. *Wayman* v. *Southard*, 10 Wheat. 1, 23; *Bank of the United States* v. *Halstead*, 10 Wheat. 57; *Gordon* v. *United States*, 117 U. S. 697, 702. And that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain. The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest.[2] Nor is there room for con-

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[1] Gannett, Boundaries of the United States, pp. 24–29.

[2] *New York* v. *Connecticut*, 4 Dall. 1, 3, 6; *New Jersey* v. *New York*, 3 Pet. 461; 5 Pet. 284; 6 Pet. 323; *Rhode Island* v. *Massachusetts*, 7 Pet. 651; 11 Pet. 226; 12 Pet. 657; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; 4 How. 591; *Massachusetts* v. *Rhode Island*, 12 Pet. 755; *Missouri* v. *Iowa*, 7 How. 660; 10 How. 1; *Florida* v. *Georgia*, 11 How. 293; 17 How. 478; *Alabama* v. *Georgia*, 23 How. 505; *Virginia* v. *West Virginia*, 11 Wall. 39; *Missouri* v. *Kentucky*, 11 Wall. 395; *South Carolina* v. *Georgia*, 93 U. S. 4; *Indiana* v. *Kentucky*, 136 U. S. 479; 159 U. S. 275; 163 U. S. 520; 167 U. S. 270; *Nebraska* v. *Iowa*, 143 U. S. 359; 145 U. S. 519; *Iowa* v. *Illinois*, 147 U. S. 1; 151 U. S. 238; 202 U. S. 59; *Virginia* v. *Tennessee*, 148 U. S. 503; 158 U. S. 267; *Missouri* v. *Iowa*, 160 U. S. 688; 165 U. S. 118; *Tennessee* v. *Virginia*, 177 U. S. 501; 190 U. S. 64; *Missouri* v. *Illinois*, 180 U. S. 208; 200 U. S. 496; 202 U. S. 598; *Kansas* v. *Colorado*, 185 U. S. 125; 206 U. S. 46; *South Dakota* v. *North Carolina*, 192 U. S. 286; *Missouri* v. *Nebraska*, 196 U. S. 23; 197 U. S. 577; *Louisiana* v. *Mississippi*, 202 U. S. 1; *Washing-*

tending to the contrary because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. This must be unless it can be said that, because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute.

It is true that in one of the cited cases (*South Dakota* v. *North Carolina*, 192 U. S. 286) it was remarked that doubt had been expressed in some instances by individual judges as to whether the original jurisdiction conferred on the court by the Constitution embraced the right of one State to recover a judgment in a mere action for debt against another. In that case, however, it is apparent that the court did not solve such suggested doubt, as that question was not involved in the case then before it and that subject was hence left open to be passed on in the future when the occasion required. But the question thus left open has no bearing upon and does not require to be considered in the case before us, first, because the power to render the judgment as between the two States whose enforcement is now under consideration is as to them foreclosed by the fact of its rendition. And second, because, while the controversy between the States culminated in a decree for money and that subject was within the issues, nevertheless, the generating cause of the controversy was the carving out of the dominion of one of the States the area composing the other and the resulting and expressly assumed obligation of the newly created State to pay the just proportion of the preëxisting debt, an ob-

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ton v. *Oregon*, 211 U. S. 127; 214 U. S. 205; *Missouri* v. *Kansas*, 213 U. S. 78; *Maryland* v. *West Virginia*, 217 U. S. 1; 217 U. S. 577; 225 U. S. 1; *North Carolina* v. *Tennessee*, 235 U. S. 1; 240 U. S. 652; *Arkansas* v. *Tennessee*, 246 U. S. 158.

ligation which, as we have seen, rested in contract between the two States, consented to by Congress and expressed in substance as a condition in the Constitution by which the new State was admitted into the Union. In making this latter statement we do not overlook the truism that the Union under the Constitution is essentially one of States equal in local governmental power, which therefore excludes the conception of an inequality of such power resulting from a condition of admission into the Union. *Ward* v. *Race Horse*, 163 U. S. 504. But this principle has no application to the question of power to enforce against a State when admitted into the Union a contract entered into by it with another State with the consent of Congress, since such question but concerns the equal operation upon all the States of a limitation upon them all imposed by the Constitution, and the equal application of the authority conferred upon Congress to vivify and give effect by its consent to contracts entered into between States.

Both parties admit that West Virginia is the owner of no property not used for governmental purposes and that therefore, from the mere issue of an execution, the judgment is not susceptible of being enforced if, under such execution, property actually devoted to immediate governmental uses of the State may not be taken. Passing a decision as to the latter question, all the contentions on either side will be disposed of by considering two subjects: first, the limitations on the right to enforce inhering in the fact that the judgment is against a State and its enforcement against such governmental being; and second, the appropriateness of the form of procedure applicable for such enforcement. The solution of these subjects may be disposed of by answering two questions which we propose to separately state and consider.

1. *May a judgment rendered against a State as a State be enforced against it as such, including the right, to the ex-*

tent necessary for so doing, of exerting authority over the governmental powers and agencies possessed by the State?

On this subject Virginia contends that, as the Constitution subjected the State of West Virginia to judicial authority at the suit of the State of Virginia, the judgment which was rendered in such a suit binds and operates upon the State of West Virginia, that is, upon that State in a governmental capacity, including all instrumentalities and agencies of state power, and indirectly binding the whole body of the citizenship of that State and the property which, by the exertion of powers possessed by the State, are subject to be reached for the purpose of meeting and discharging the state obligation. As then, the contention proceeds, the legislature of West Virginia possesses the power to tax and that body and its powers are all operated upon by the judgment, the inability to enforce by means of ordinary process of execution gives the right and sanctions the exertion of the authority to enforce the judgment by compelling the legislature to exercise its power of taxation. The significance of the contention and its scope are aptly illustrated by the reference in argument to the many decided cases holding that, where a municipality is empowered to levy specified taxation to pay a particular debt, the judicial power may enforce the levy of the tax to meet a judgment rendered in consequence of a default in paying the indebtedness.[1]

On the other hand, West Virginia insists that the defendant as a State may not, as to its powers of government reserved to it by the Constitution, be controlled or limited by process for the purpose of enforcing the

[1] *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Riggs* v. *Johnson County*, 6 Wall. 166; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Labette County Commissioners* v. *Moulton*, 112 U. S. 217; *County Commissioners of Cherokee County* v. *Wilson*, 109 U. S. 621.

payment of the judgment. Because the right for that end is recognized, to obtain an execution against a State and levy it upon its property, if any, not used for governmental purposes, it is argued, affords no ground for upholding the power, by compelled exercise of the taxing authority of the State, to create a fund which may be used when collected for paying the judgment. The rights reserved to the States by the Constitution, it is further insisted, may not be interfered with by the judicial power merely because that power has been given authority to adjudicate at the instance of one State a right asserted against another, since, although the authority to enforce the adjudication may not be denied, execution to give effect to that authority is restrained by the provisions of the Constitution which recognize state governmental power.

Mark, in words a common premise—a judgment against a State and the authority to enforce it—is the predicate upon which is rested on the one hand the contention as to the existence of complete and effective, and the assertion, on the other, of limited and inefficacious power. But it is obvious that the latter can only rest upon either treating the word state, as used in the premise, as embracing only a misshapen or dead entity, that is, a State stripped for the purpose of judicial power of all its governmental authority, or, if not, by destroying or dwarfing the significance of the word state as describing the entity subject to enforcement, or both. It needs no argument to demonstrate that both of these theories are incompatible with and destructive of the very numerous cases decided by this court to which we have referred. As it is certain that governmental powers reserved to the States by the Constitution—their sovereignty—were the efficient cause of the general rule by which they were not subject to judicial power, that is, to be impleaded, it must follow that, when the Constitution gave original

jurisdiction to this court to entertain at the instance of one State a suit against another, it must have been intended to modify the general rule, that is, to bring the States and their governmental authority within the exceptional judicial power which was created. No other rational explanation can be given for the provision. And the context of the Constitution, that is, the express prohibition which it contains as to the power of the States to contract with each other except with the consent of Congress, the limitations as to war and armies, obviously intended to prevent any of the States from resorting to force for the redress of any grievance real or imaginary, all harmonize with and give force to this conception of the operation and effect of the right to exert, at the prayer of one State, judicial authority over another.

But it is in substance said this view must be wrong for two reasons: (a) because it virtually overrides the provision of the Constitution reserving to the States the powers not delegated, by the provision making a grant of judicial power for the purpose of disposing of controversies between States; and (b) because it gives to the Constitution a construction incompatible with its plain purpose, which was, while creating the nation, yet, at the same time, to preserve the States with their governmental authority in order that state and nation might endure. Ultimately, the argument at its best but urges that the text of the Constitution be disregarded for fear of supposed consequences to arise from enforcing it. And it is difficult to understand upon what ground of reason the preservation of the rights of all the States can be predicated upon the assumption that any one State may destroy the rights of any other without any power to redress or cure the resulting grievance. Nor, further, can it be readily understood why it is assumed that the preservation and perpetuation of the Constitution depend upon the ab-

sence of all power to preserve and give effect to the great guarantees which safeguard the authority and preserve the rights of all the States.

Besides, however, the manifest error of the propositions which these considerations expose, their want of merit will be additionally demonstrated by the history of the institutions from which the provisions of the Constitution under review were derived, and by bringing into view the evils which they were intended to remedy and the rights which, it was contemplated, their adoption would secure.

Bound by a common allegiance and absolutely controlled in their exterior relations by the mother country, the colonies before the Revolution were yet as regards each other practically independent, that is, distinct one from the other. Their common intercourse, more or less frequent, the contiguity of their boundaries, their conflicting claims, in many instances, of authority over undefined and outlying territory, of necessity brought about conflicting contentions between them. As these contentions became more and more irritating, if not seriously acute, the necessity for the creation of some means of settling them became more and more urgent, if physical conflict was to be avoided. And for this reason, it is to be assumed, it early came to pass that differences between the colonies were taken to the Privy Council for settlement and were there considered and passed upon during a long period of years, the sanction afforded to the conclusions of that body being the entire power of the realm, whether exerted through the medium of a royal decree or legislation by Parliament. This power, it is undoubtedly true, was principally called into play in cases of disputed boundary, but that it was applied also to the complaint of an individual against a colony concerning the wrongful possession of property by the colony alleged to belong to him, is not disputed. This general situation as to the disputes between the colonies and the power to dispose of them by

the Privy Council was stated in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 739, *et seq.*, and will be found reviewed in the authorities referred to in the margin.[1]

When the Revolution came and the relations with the mother country were severed, indisputably controversies between some of the colonies, of the greatest moment to them, had been submitted to the Privy Council and were undetermined. The necessity for their consideration and solution was obviously not obscured by the struggle for independence which ensued, for, by the Ninth of the Articles of Confederation, an attempt to provide for them as well as for future controversies was made. Without going into detail it suffices to say that that article in express terms declared the Congress to be the final arbiter of controversies between the States and provided machinery for bringing into play a tribunal which had power to decide the same. That these powers were exerted concerning controversies between the States of the most serious character again cannot be disputed. But the mechanism devised for their solution proved unavailing because of a want of power in Congress to enforce the findings of the body charged with their solution, a deficiency of power which was generic, because resulting from the limited authority over the States conferred by the Articles of Confederation on Congress as to every subject. That this absence of power to control the governmental attributes of the States, for the purpose of enforcing findings concerning disputes between them, gave rise to the most serious consequences, and brought the States to the very verge of physical struggle, and resulted in the shedding of blood and would, if it had not been for the adoption of the Constitution of the United States, it

[1] Acts of the Privy Council, Colonial Series, vols. I to V, passim; Snow, The Administration of Dependencies, Chap. V and passim; Gannett, Boundaries of the United States, pp. 35, 41, 44, 49–52, 73, 88; Story on the Constitution (5th ed.), §§ 80, 83, 1681.

may be reasonably assumed, have rendered nugatory the great results of the Revolution, is known of all and will be found stated in the authoritative works on the history of the time.[1]

Throwing this light upon the constitutional provisions, the conferring on this court of original jurisdiction over controversies between States, the taking away of all authority as to war and armies from the States and granting it to Congress, the prohibiting the States also from making agreements or compacts with each other without the consent of Congress, at once makes clear how completely the past infirmities of power were in mind and were provided against. This result stands out in the boldest possible relief when it is borne in mind that, not a want of authority in Congress to decide controversies between States, but the absence of power in Congress to enforce as against the governments of the States its decisions on such subjects, was the evil that cried aloud for cure, since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to States created, joined with the prohibitions placed upon the States, all combined to unite the authority to decide with the power to enforce—a unison which could only have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future. And, while it may not materially add to the demonstration of the result stated, it may serve a useful purpose to direct attention to the probable operation of tradition upon the mind of the framers, shown by the fact that, harmonizing with the practice which prevailed during the colonial period in the

[1] Fiske, The Critical Period of American History, pp. 147 *et seq.*; McMaster, History of the People of the United States, vol. I, pp. 210 *et seq.*; Miner, History of Wyoming.

See also Story on the Constitution (5th ed.), §§ 1679, 1680; 131 U. S., Appendix L.

Privy Council, the original jurisdiction as conferred by the Constitution on this court embraced not only controversies between States but between private individuals and a State—a power which, following its recognition in *Chisholm* v. *Georgia*, 2 Dall. 419, was withdrawn by the adoption of the Eleventh Amendment. The fact that in the Convention, so far as the published debates disclose, the provisions which we are considering were adopted without debate, it may be inferred, resulted from the necessity of their enactment, as shown by the experience of the colonies and by the spectre of turmoil, if not war, which, as we have seen, had so recently arisen from the disputes between the States, a danger against the recurrence of which there was a common purpose efficiently to provide. And it may well be that a like mental condition accounts for the limited expressions concerning the provisions in question in the proceedings for the ratification of the Constitution which followed, although there are not wanting one or two instances where they were referred to which when rightly interpreted make manifest the purposes which we have stated.[1]

The State, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their exertion may operate upon the governmental powers of the State, we are brought to consider the second question, which is:

2. *What are the appropriate remedies for such enforcement?*

Back of the consideration of what remedies are appropriate, whether looked at from the point of view of the exertion of equitable power or the application of legal remedies extraordinary in character (mandamus, etc.,) lies

[1] Vol. 2, Elliot's Debates, pp. 462, 490, 527; Vol. 3, pp. 571, 573; The Federalist, No. 81.

the question what ordinary remedies are available, and that subject must necessarily be disposed of. As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative or executive, which may be appropriately exercised. And, confining ourselves to a determination of what is appropriate in view of the particular judgment in this cause, two questions naturally present themselves: (a) the power of Congress to legislate to secure the enforcement of the contract between the States; and (b) the appropriate remedies which may by the judicial power be exerted to enforce the judgment. We again consider them separately.

(a) *The power of Congress to legislate for the enforcement of the obligation of West Virginia.*

The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement. This must be the case unless it can be said that the duty of exacting the carrying out of a contract is not, within the principle of *McCulloch* v. *Maryland*,

4 Wheat. 316, relevant to the power to determine whether the contract should be made. But the one is so relevant to the other as to leave no room for dispute to the contrary.

Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true, it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States. Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statement proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. Obviously, if it be conceded that no power obtains to enforce as against a State its duty under the Constitution in one respect and to prevent it from doing wrong to another State, it would follow that the same principle would have to be applied to wrongs done by other States, and thus the government under the Constitution would be not an indissoluble union of indestructible States but a government composed of States each having the potency with impunity to wrong or degrade another—a result which would inevitably lead to a destruction of the union between them. Besides, it must be apparent that to treat the power of Congress to legislate to secure the performance by a State of its duty under the Constitution, that is, its continued respect for and obedience to that instrument, as coercion, comes back

at last to the theory that any one State may throw off and disregard without sanction its obligation and subjection to the Constitution. A conclusion which brings at once to the mind the thought that to maintain the proposition now urged by West Virginia would compel a disregard of the very principles which led to the carving out of that State from the territory of Virginia; in other words, to disregard and overthrow the doctrines irrevocably settled by the great controversy of the Civil War, which in their ultimate aspect find their consecration in the amendments to the Constitution which followed.

Nor is there any force in the suggestion that the existence of the power in Congress to legislate for the enforcement of a contract made by a State under the circumstances here under consideration is incompatible with the grant of original jurisdiction to this court to entertain a suit between the States on the same subject. The two grants in no way conflict, but coöperate and coördinate to a common end, that is, the obedience of a State to the Constitution by performing the duty which that instrument exacts. And this is unaffected by the fact that the power of Congress to exert its legislative authority, as we have just stated it, also extends to the creation of new remedies in addition to those provided for by § 14 of the Judiciary Act of 1789 (1 Stat. 81, c. 20, now § 262, Judicial Code) to meet the exigency occasioned by the judicial duty of enforcing a judgment against a State under the circumstances as here disclosed. We say this because we think it is apparent that to provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative and not the exercise of a judicial power.

This leaves only the second aspect of the question now under consideration.

(b) *The appropriate remedies under existing legislation.*

The remedy sought, as we have at the outset seen, is

an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and on the other hand it is contended that the duty to give effect to the judgment against the State, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion, that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because, impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a State and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a two-fold way having been also pointed out, we are fain to believe that, if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both the re-

quirements of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but because of the character of the parties and the nature of the controversy—a contract approved by Congress and subject to be by it enforced—we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed—briefly stated, the judgment against the State operating upon it in all its governmental powers and the duty to enforce it viewed in that aspect—, our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: 1. The right under the conditions previously stated to award the mandamus prayed for; 2. If not, the power and duty to direct the levy of a tax as stated; 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy, by dealing with the funds or taxable property of West Virginia or the rights of that State, as may secure an execution of the judgment. In saying this, however, to the end that, if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions), occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the

judgment, as well as concerning the means otherwise existing in the State of West Virginia, if any, which, by the exercise of the equitable powers in the discharge of the duty to enforce payment, may be available for that purpose.

And it is so ordered.

WAITE ET AL., AS GENERAL APPRAISERS, DESIGNATED BY THE SECRETARY OF THE TREASURY AS THE BOARD OF TEA APPEALS, *v.* MACY ET AL., DOING BUSINESS AS COPARTNERS UNDER THE NAME OF CARTER, MACY & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 255. Argued March 28, 1918.—Decided April 22, 1918.

A transgression of its statutory power by an administrative board is subject to judicial restraint, although guised as a discretionary decision within its jurisdiction.

In testing the right of injunction against administrative officers, the presumption that they will follow the law, though set up in their answer, cannot be indulged where an intention to obey an illegal regulation of their superior is not directly disclaimed by them and is admitted by their counsel.

The only grounds recognized by the Act of March 2, 1897, c. 358, 29 Stat. 604, as amended, c. 170, 35 Stat. 163, for excluding tea from import, are inferiority to the standard in purity, quality and fitness for consumption; and, where the tea offered is otherwise superior to the standard in value and purity, the fact that it contains a minute and innocuous quantity of coloring matter not found in the sample will not justify shutting it out, notwithstanding a regulation of the Secretary of the Treasury, purporting to be based on the statute, declares the presence of any coloring matter an absolute ground for exclusion.

In the absence of other adequate remedy for the importer, the Tea Board constituted under the Act of 1897, *supra*, may be enjoined from excluding tea upon a test prescribed by the Secretary of the Treasury but not sanctioned by the statute.

224 Fed. Rep. 359, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for appellants.

Mr. Joseph H. Choate, Jr., for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by importers of tea to prevent the appellants, a board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiffs tests which, it is alleged, are illegal and if applied will lead to the exclusion of the tea. The bill was dismissed by the District Court, 215 Fed. Rep. 456, but the decree was reversed and an injunction ordered by the Circuit Court of Appeals, 224 Fed. Rep. 359. 140 C. C. A. 45.

The case is within a narrow compass. The Act of March 2, 1897, c. 358, 29 Stat. 604, amended by the Act of May 16, 1908, c. 170, 35 Stat. 163, provides for the establishment of standards "of purity, quality, and fitness for consumption, of all kinds of tea imported," &c., § 3, and makes it "unlawful . . . to import any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards" referred to. § 1. When the tea is entered at the custom house it is compared with the standards by an examiner and if found equal to them in the above particulars it may be released by the custom house; if found inferior it is to be retained. § 5. But either side may protest and have the matter referred to a board of three general appraisers such as the appellants are. If upon a final reëxamination by the board "the

tea shall be found inferior in purity, quality, and fitness for consumption to the said standards" the tea must be removed from the country within six months. § 6. The tea is to be tested in the particulars mentioned "according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis." § 7. The Secretary of the Treasury is given power to enforce the provisions of the act by appropriate regulations. § 10. A regulation has adopted a test for the discovery of artificial coloring matter which in brief consists in rubbing tea leaves reduced to dust upon semi-glazed paper with a spatula and examining the smear with a lens. If particles of coloring matter are found a test sheet is submitted to chemical analysis for identification of the coloring matter and as soon as it is identified the tea is to be rejected. It was said below to be undisputed that if the tea in question contains any coloring matter, whether present through design or accident, the appellants pursuing the regulation will keep it out. The standard samples of this tea contain no coloring matter but contain a far greater amount of other foreign substances than does this. This tea is worth nearly four times as much a pound as the standard and the sole cause for rejecting it is the presence of from nine to nineteen parts of Prussian blue in a million of elements otherwise not objected to. It is not contended that the Prussian blue is deleterious. These facts are found by both Courts below. Upon them the plaintiffs (the appellees) say that the Government is attempting to apply criteria not allowed by the law. The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.

No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot en-

large the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill* v. *Jones*, 106 U. S. 466. *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215. *United States* v. *George*, 228 U. S. 14, 21. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque* v. *Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain.

We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there has been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute

rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

The Secretary and the board must keep within the statute, *Merritt* v. *Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544, and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620. *Sante Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492. We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights.

Decree affirmed.

SAALFIELD, ADMINISTRATOR OF BROWN, SURVIVING CLAIMANT, ETC., *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 101. Argued March 27, 1918.—Decided April 22, 1918.

Where a contract for the manufacture of guns for the United States provided for a preliminary test subject to the decision of the Chief of Ordnance and the Secretary of War, those officials were to decide, not arbitrarily, but candidly and reasonably, whether the test had been satisfied.

The findings of fact justify the conclusion that the test gun did not meet the contract requirements; the report of the Chief of Ordnance viewed as a whole in the light of the circumstances is consistent with this conclusion; there is no ground for the charge that the Chief of Ordnance and the Secretary of War, in annulling the contract, acted in bad faith or under gross mistake, or for holding that the Government by delays injurious to the contractors waived the right to annul.

51 Ct. Clms. 22, affirmed.

THE case is stated in the opinion.

Mr. George A. King and *Mr. George H. Lamar* for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal to review a judgment by the Court of Claims in favor of the Government, on a claim for damages growing out of a written contract dated May 18, 1898, for the manufacture of 50 wire-wound rapid fire guns, 25 of 5-inch caliber and 25 of 6-inch caliber. No guns having been delivered under the contract it was annulled by the Chief of Ordnance, with the approval of the Secretary of War, in an order, notice of which was given to the claimants on January 17, 1901. The appellant is the administrator of the survivor of one of two claimants to whom we shall refer in this opinion as "the claimants."

The essential parts of the contract to be considered are as follows:

"The muzzle velocity shall not be less than 2,600 f. s., with a good smokeless powder that shall not give a pressure of over 40,000 pounds per square inch, using a projectile of 55 pounds weight for the 5-inch gun and 100 pounds weight for the 6-inch gun. . . . The system of rapid-fire breech mechanism employed will be either the Brown or Dashiell, and must meet with the approval of the Ordnance Department. . . . It must permit of being easily and conveniently operated, and permit the same man to traverse, elevate, sight and fire, without moving the eye from the sight. . . . The first gun manufactured will be fired with full service charges of powder, such as that used in testing other rapid-fire guns

of similar caliber, and with not more than the regular service pressures for endurance, and the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the Department may require, 5 rounds to be fired with pressures of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily. . . .

"Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation. . . .

"It is stipulated and agreed that the party of the first part shall deliver for test the first complete gun with mount, etc., within three months from the date of execution of this contract. . . .

"If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final."

"5th. If any default shall be made by the parties of the first part in delivering all or any of the guns, etc., mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the Chief

of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred."

It is apparent from these excerpts that the contract contemplates the making and testing of a "type gun" of each caliber; that the acceptance of additional guns was dependent on this one "passing its test satisfactorily," and that the Chief of Ordnance and his superior officer, the Secretary of War, were to decide, not arbitrarily, but candidly and reasonably, whether the gun had satisfied the required test. *Ripley* v. *United States*, 223 U. S. 695, 701–2.

The 5-inch test gun was to have been completed within three months from the date of the contract, but there were delays, assented to by the Government, such that it was not completed for ten months, so that the first test began on March 8th of the following year (1899).

The finding by the Court of Claims as to what occurred during this firing test, to which the type gun of 5-inch caliber was subjected, is as follows:

"The test firing began with a pressure of 18,000 pounds per square inch, which was raised on the second round to 21,050 pounds, and on the third round to 32,800 pounds, with a muzzle velocity of 2,705 feet per second, and on the fourth round to 35,750 pounds pressure, with a muzzle velocity of 2,821 feet per second, *on which round the carriage was injured*, it not being strong enough to stand such high muzzle velocities.

"The claimants then protested against the increases made in the powder charge and insisted that any charge that was sufficient to produce a muzzle velocity of 2,600 feet per second was all that was required by the contract, except for the five high-pressure rounds required at the close of the test. This question was submitted to the Chief of Ordnance before firing was continued and by him

decided in favor of the claimants. Thereafter the powder charge was so adapted as to give this muzzle velocity of 2,600 feet per second as a general rule, except in the said five high-pressure rounds at the close of the test, which were fired with pressures of between 45,000 and 50,000 pounds per square inch. *On one of these high-pressure rounds, the 293rd round, the breech bushing and jacket of the gun were cracked and the breech could not be opened by hand.*

"These breaks were repaired, but *the mechanism repaired did not operate satisfactorily thereafter.*

"During the course of the test the gun was star-gauged by the Government inspector about every 50 rounds, and these gaugings, at different times throughout the test and at different points in the bore, *indicated varying and shifting changes*, both increases and decreases, in the diameters of different cross-sections of the bore, the gauging at several times and places *indicating a reduction of the normal diameter* of 5 inches down to 4.99 inches; and as a precaution against the danger of rupture or explosion of the gun by a reduction of the bore sufficient to cause the projectile to stick in the bore when the gun was fired an iron plug of the diameter of the projectile was passed through the bore about every 10 or 12 rounds, *on one of which occasions, about the 100th round, it stuck in the bore so tight at one point as to require the efforts of three men to force it through with a pole.*

"At all times, with this exception, the plug passed through freely.

"These reductions and variations in the diameter of the bore of the gun were to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun, *but were principally due to changes in the cross section of the bore from a round to an elliptical form, resulting from a shifting of the segments enveloping the liner tube by the explosion of the charge*, and also to an

actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic tension of the wire with which the tube and its enveloping segments were wound and bound together, which tension, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube.

"In large guns of ordinary types of construction there is *usually a slight contraction of bore* during the first few rounds of firing, after which the gun settles down to a new condition, and thereafter *the changes of bore diameter in a normal gun are almost entirely in the way of increase of diameter from erosion and abrasion.*

"While the variations and reductions in the diameter of the bore of the type gun indicated by the star-gauging during the firing test *did not quite reach a point of actual danger to the gun from rupture or explosion* by sticking of the projectile in the bore in the process of firing *they did reach the limit of safety in this respect, and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials of the War Department connected with the execution of the contract for the guns, and caused the Chief of Ordnance and the Secretary of War to refuse to pass and accept the type gun unless it should satisfactorily pass a further test of 100 additional rounds,* as proposed and recommended by the Chief of Ordnance in his indorsement of November 3, 1899, hereinafter set forth. This apprehension was heightened by the fact of the new and comparatively untried type of construction of the gun, and by its reversal of the usual behavior of guns of the ordinary types of construction in the way of its continued contractions and changes of bore in the course of extended use."

These findings of fact, which, under the circumstances of this case, must be accepted as final (173 U. S. 464, 470; 239 U. S. 221), if considered independently of the report

of the Chief of Ordnance, yet to be discussed, obviously justify the conclusion that the test gun did not meet the contract requirements.

The carriage of this new and experimental type gun failed on the fourth round of firing, with a pressure well within the contract maximum; the gun itself developed such cracks in the breech bushing and jacket that the breech could not be opened by hand and did not work satisfactorily after repairs were made; and it showed unusual and abnormal changes in the bore which, while not resulting in an explosion, created, in the mind of the Chief of Ordnance, a reasonable apprehension of danger in the use of the gun, and in his judgment required that it be modified and that it be subjected to an additional firing test, before it could be accepted as having satisfactorily passed the test prescribed by the contract.

The report of the Chief of Ordnance to the Secretary of War on the result of this contract test is dated November 3, 1899, and is as follows:

"In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, *yet its test has apparently met the contract requirements*, and if certain modifications in the gun and its carriage shall be made in their further manufacture to remedy defects developed in the test, and in other respects be made to meet more fully the requirements of the department, *to which propositions the company willingly agrees*, it is recommended that the 5-inch type gun and its mount be accepted, *subject, however*, to the condition that, in view of the moderate pressure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures and assimilating more nearly *the pressures that would be experienced in actual service*, and that in the further manufacture of the guns they shall be modified, at the expense of the company,

so as to remedy any further defects that may be developed in these additional firings."

The claimants' contention is rested largely upon this clause in the above paragraph, viz: "Yet its test has apparently met the contract requirements." And their argument is that the test which the gun must meet was prescribed by the contract: that the facts found, and especially this clause, show that it proved equal to the required test; that the subsequent annulling of the contract by the Chief of Ordnance, with the approval of the Secretary of War "was not made and taken in good faith, but under a mistake so gross as to justify an inference of bad faith;" and that, therefore, the claimants are entitled to recover the damages prayed for.

If this expression, so much relied upon, stood as the unqualified conclusion of the Chief of Ordnance and had been approved by the Secretary of War, the interpretation claimed for it might be justified, but the contextual setting of the clause shows clearly that in the opinion of the Chief of Ordnance "defects (had) developed in the test," which could be remedied only if certain modifications were made in the manufacture of both the gun and carriage, and that his understanding when making the report was that the claimants concurred in this conclusion and willingly agreed to conform to it.

The clause of the report so emphasized is the expression of a soldier, not of a technical lawyer, and the paragraph of the report in which it is found, taken altogether, conveys to us the conviction that the Chief of Ordnance, while concluding that the gun was defective in design and construction, nevertheless believed that it contained elements of invention which, modified and improved, would make of it a weapon of value to his country and that he was eager to lend official assistance to its further development, which he believed the claimants were equally eager to receive and profit by. In the interpretation most favor-

able to the claimants the report is an acceptance conditioned upon developments and improvement of the gun which the Chief of Ordnance thought possible, but which conditions, as we shall see, the claimants, perhaps because of less confidence in their invention, never attempted to satisfy.

On January 31, 1900, this report of the Chief of Ordnance was approved by the Secretary of War, and a week later the decision and recommendation thus approved were communicated to the claimants.

But, instead of the coöperation which the Chief of Ordnance thought assured, the Government next heard from the claimants through lawyers and then through a letter from the claimants themselves, asking the Secretary of War to suspend further action until argument could be heard, and stating that "they had not as yet assented to any modification of the gun and carriage."

The Secretary of War replied to the lawyers that there was no question before him open to argument, but what, if any, reply was made to the letter of the claimants does not appear.

However, long prior to this, on May 16, 1899, after the test firing had been suspended and three months before it was completed, it was suggested by the Government to the claimants that they should furnish "the mathematical computations and engineering considerations upon which their claims of strength of construction and other qualities of their gun were based." No notice was taken of this suggestion for almost a year, and not until after claimants were officially notified of the approval by the Secretary of War of the report of the Chief of Ordnance of November 3, 1899. Thereafter, on February 17th, 1900, the claimants notified the Chief of Ordnance that they had employed two expert mathematicians to work out the various problems connected with the construction of their gun, and suggesting that they would like to

have an army "officer of practical experience with artillery" assigned to coöperate with their selected experts and that they would compensate him for the service. Two days later the Government acceded to this and authorized a major in the army to join in making the computations as suggested by the claimants.

The finding of the Court of Claims does not show that anything further was done until, on January 17, 1901, almost three years after this three months' contract was to have been completed, when, after the claimants had permitted almost a year to pass without accepting the suggestion of the Government that modifications should be made in the gun and carriage to cure the defects which the firing test had disclosed, the Chief of Ordnance, with the approval of the Secretary of War, notified the claimants that, for failure to deliver an acceptable gun, their contract had been declared null and void. Against this conclusion the claimants protested and appealed to the Secretary of War for a revocation of the annullment order, but after hearing the claimants and their lawyers several times, the Secretary of War refused to revoke this order.

A month after the revocation order, the experts, employed almost a year before by the claimants, rendered to their employers a report on the technical problems connected with the construction of the gun, which the Government had called for almost two years before. This report the Court of Claims finds was "upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in the way of modifications in the construction."

This discussion of the findings of fact by the Court of Claims leads us unhesitatingly to the conclusion that the claim that the Secretary of War and the Chief of Ordnance acted in bad faith or under a gross mistake is wholly

unfounded and gratuitous; that, on the contrary, they dealt candidly, generously, even helpfully, with the claimants and that the annullment of the contract under the circumstances was abundantly justified. The cause of the misfortune, which the claimants undoubtedly suffered, is not to be found in their treatment by the officials of the War Department but in their own refusal, from whatever cause, to accept the encouraging suggestion of the Chief of Ordnance that the Department was willing, by generous dealing and coöperation, to assist them in carrying forward their experimental gun to a successful development.

The claims made in argument that by various delays on its part the Government, in some indefinite way, waived its right to annul the contract, and that this right to annul was suspended until report should be made on the technical problems involved, by the experts selected by the claimants, it is true with the coöperation of the Government, but almost a year before, cannot be seriously considered. In the matter of delays the claimants were as much at fault and more, than the Government, and the delay of the technical report for almost a year was reasonable ground for assuming that no report was likely to be made, or that if made it would not be favorable to the acceptance of the gun, which last, as we have seen, is shown by the finding of facts by the Court of Claims, to have proved to be the case.

The judgment of the Court of Claims must be

Affirmed.

ZOILO IBANEZ DE ALDECOA Y PALET ET AL. *v.* HONGKONG & SHANGHAI BANKING CORPORATION ET AL.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 230. Argued March 20, 21, 1918.—Decided April 29, 1918.

As to cases existing at the time of its enactment, the Philippine Code of Civil Procedure did not displace the system of parental control and usufructuary interest defined by the Civil Code, respecting the property of minor children. *Held*, therefore, that the right of a parent to emancipate minor children and thus endow them with capacity to make a valid mortgage of their real estate persisted notwithstanding the Code of Civil Procedure.

Section 581 of the Code of Civil Procedure, providing that "all proceedings in cases of guardianship pending . . . at the time of the passage of this Act, shall proceed in accordance with the existing Spanish procedure under which the guardians were appointed," is construed broadly as relating not merely to court proceedings, but as expressly preserving existing powers and usufructuary rights of parents over the property of minor children, existing under the Civil Code.

30 Phil. Rep. 228, affirmed.

THE case is stated in the opinion.

Mr. Antonio M. Opisso for appellants.

Mr. C. C. Tucker, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. C. Fisher* were on the briefs, for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit by appellants Joaquin Ibanez de Aldecoa and Zoilo Ibanez de Aldecoa, brought in the Court of First

Instance of Manila, to have declared null and void a mortgage executed by them in favor of appellees on the ground that when they executed the mortgage they were unemancipated minors.

After some preliminary procedure and upon answer filed and hearing had, the Court of First Instance dismissed the suit as to Joaquin Ibanez but granted relief in favor of Zoilo Ibanez. Upon appeal the Supreme Court of the Philippine Islands affirmed the judgment so far as it sustained the validity of the mortgage as to Joaquin Ibanez and reversed the judgment so far as it declared the nullity of the mortgage as to Zoilo Ibanez, and declared the mortgage binding upon the latter; that is, declared the mortgage valid as to both. This appeal was then prosecuted.

The facts are not in dispute. The appellants were born in the Islands, their parents being natives of Spain. Their father's domicile was in Manila, where he died October 4, 1895. After his death the firm of Aldecoa and Company, of which he had been a regular member, was reorganized and his widow became one of the general or "capitalistic" partners of the firm and she appeared as such in the articles of partnership.

On July 31, 1903, the mother of the appellants, they then being over the age of eighteen years, went before a notary public and executed two instrumcnts wherein and whereby she emancipated them with their consent.

No guardian of the person or property of appellants has ever been applied for or appointed under the Code of Civil Procedure of the Islands since its promulgation; instead appellants had continued from the death of their father under the custody of their mother until the execution of the instruments of emancipation.

February 23, 1906, the firm of Aldecoa and Company was heavily indebted to the appellee bank and the bank was pressing for payment or security. In consequence

the mortgage, which is the subject of this suit, was executed February 23, 1906. On December 31, 1906, the firm expired by limitation and went into liquidation.

The question presented is whether the mother of appellants could legally emancipate them and thus confer upon them capacity to execute a valid mortgage of their real property, they consenting. The solution of the question, the Supreme Court said, "involves an inquiry as to the effect of the provisions of the New Code of Civil Procedure relating to guardianship upon certain provisions of the Civil Code relating to the control by parents over the persons and property of their minor children."

In other words, the question in the case turns upon the accommodation or conflict between certain provisions of the Civil Code and certain provisions of the Code of Civil Procedure, the latter being later in enactment. If its provisions did not repeal or supersede the provisions of the other, the mother of appellants had power to emancipate them and their mortgage was a valid instrument. On this question the courts below are in dissonance. The Court of First Instance considered that the codes were irreconcilable and gave a repealing strength to the Code of Civil Procedure. The Supreme Court rejected this conclusion and gave accommodation to the provisions of the codes by excluding those of the Code of Civil Procedure from operation upon parents who had assumed charge of the property of their minor children and were enjoying its usufruct prior to the adoption of that code. In other words, the rights and duties of such parents with respect to their children, including the right of emancipation, continued to be regulated by the Civil Code.

The court deduced this conclusion from the explicit language of the Civil Code conferring parental authority, the absence of a repealing, or modifying or superseding word in the Code of Civil Procedure, and the declaration of the latter that guardianships pending at the time of its

passage should "proceed in accordance with Spanish law," with certain exceptions, which emphasized the declaration. The declaration is important and we therefore quote it. It is § 581 and is as follows: "Pending guardianships to proceed in accordance with Spanish law, with certain exceptions. All proceedings in cases of guardianship pending in the Philippine Islands at the time of the passage of this Act, shall proceed in accordance with the existing Spanish procedure under which the guardians were appointed; *Provided, nevertheless*, That any guardian appointed under existing Spanish law may be removed in accordance with the provisions of section 574 of this Act, and his successor may be appointed as therein provided, and every successor to a guardian so removed shall, in the administration of the person or estate, or either, as the case may be, of his ward, be governed by the provisions of this Act."

The construction by the Supreme Court is vigorously assailed by appellants. It was so assailed in the Supreme Court and the court answered it and other contentions of appellants by a discussion at once minute and comprehensive. It is not possible to reproduce it or even epitomize it. Its basis is the customs and habits of a people with resulting rights which found expression and sanction in the Civil Code and of which there is no repeal, it was held, or displacement in the Code of Civil Procedure. And the abruptness of the change and disorder of rights which the contentions of appellants involve the court felt and declared.

The change, if change there was, was certainly abrupt and quite radical. Under the Civil Code parents had general control over the property of their children. "The father, or, in his absence, the mother, is the legal administrator of the property of the children who are under their authority" (§ 159), and by subsequent sections a usufruct in the property was given to the parents. "Fil-

iation," the court said, "stood in lieu of those legal safeguards" with which the "Code of Civil Procedure envelops the property of a minor child." And the court pointed out that there were certain restrictions upon the parent but they "did not make the parent a guardian." It was further held that the Civil Code drew a sharp and clearly distinguishable line between guardianship properly so-called, and the *patria potestas*, or parental authority, and confined the former to guardianship contained in article 199 of that code which defined it as "the custody of the person and property or only of the property of those who, not being under the parental authority, are incapable of taking care of themselves."

It was upon these considerations that the court based its judgment, and if it be granted there are counter considerations of strength we are disposed to defer to the tribunal "on the spot." It has support in the principles of our jurisprudence which are repellent to retrospective operation of a law and the repeal by implication of one law by another. These principles have urgency in the present case. The change contended for is not only abrupt but fundamental. It is not change of procedure merely but of systems, disturbing rights, devesting or imposing obligations. Indeed, the present case is an example. The mother of appellants, in confidence of her right to do so, emancipated the appellants, and the appellees in equal confidence accepted it as legal, and that many are in like situation under like confidences may be conjectured.

It is in effect urged, however, that such disorder was foreseen and accepted as a consequence of existing laws which the legislators with ability and care made a study of, and, "finding the law of guardianship and the law of parental authority, as they stood then, repugnant to the American idea of justice, 'ruthlessly brushed aside' the old order and inaugurated 'the new in the form which had

withstood the test of time in the United States.'" In other words, displaced the parental authority and all that it meant of power of administration and enjoyment by the parents of the estates of their minor children.

We concede the care and ability of the legislators but deduce a conclusion different from that of counsel. We are convinced that neither would have been exercised to displace abruptly a system so fixed in the habits and sentiments of a people as parental authority was in the habits of the Islands, and certainly not without explicit declaration, and leave without warning so radical and important a change to be collected from disputable implications. We concur, therefore, with the Supreme Court that § 581, *supra*, was intended to save "from the operation of the new act all proceedings in cases of guardianship pending in the Philippine Islands at the time of its passage." And guardianship and the administration of an estate did not mean, as contended by appellants, something procedural in a court, but they meant what the laws recognized as such and, we have seen, § 159 of the Civil Code provides that "the father, or, in his absence, the mother, is the legal administrator of the property of the children who are under their authority." The right is a valuable one and it has as an incident a right as valuable, the usufruct of the estate administered.

The value and extent of both rights this court has had occasion to declare in *Darlington* v. *Turner*, 202 U. S. 195, 230, *et seq.*, and in view of that case we are forced to think that, however our habits may induce us to approve the American system of the relation of parent and child and that there should be interposed between them when property interests are involved the order of a court and the security of bonds, there are other peoples—including a State of this Union—who have found that they could rely with confidence on other than material considerations for the performance of duty and that "filiation"

could stand in lieu of "those legal safeguards" with which the new code of procedure "envelops the property of a minor child."

There are other contentions of appellants which are either mixed with questions of fact or depend upon an appreciation of local matters and procedure the decision of the local court upon which we accept.

Judgment affirmed.

JOAQUIN IBANEZ DE ALDECOA Y PALET ET AL. *v.* HONGKONG & SHANGHAI BANKING CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 231. Argued March 20, 21, 1918.—Decided April 29, 1918.

Mortgagors, in an action to foreclose, unsuccessfully pleaded in abatement their pending action to annul the mortgage, which had been submitted. *Held*, that the ruling, even if erroneous, became harmless in view of a judgment in the earlier action by which the validity of the mortgage was correctly sustained.

The court accepts the lower courts' interpretation of the Philippine law (Civil Code, Art. 1851) to the effect that mere failure of a creditor to sue when the obligation in whole or in part matures does not extend its term, and that to extinguish a surety's liability an extension must be based on some new agreement by which the creditor deprives himself of the right immediately to enforce his claim.

The judgment of the trial court is modified to correct a clerical error, appearing by the trial court's opinion and by concession of appellee's counsel.

30 Phil. Rep. 255, affirmed.

THE case is stated in the opinion.

Mr. Antonio M. Opisso for appellants.

Mr. C. C. Tucker, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. F. C. Fisher* were on the briefs, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This suit was submitted with No. 230, just decided, *ante*, 621. It was brought in the Court of First Instance of Manila to foreclose, among other purposes, the mortgage which that suit was brought to declare void. The defense in this case of Joaquin Ibanez and Zoilo Ibanez is based on the same ground that they alleged as a cause of action in the other case, that is, that the mortgage is a nullity because they were unemancipated minors when it was executed. This contention and the facts and legal propositions relevant to it are set out in No. 230 and need not be repeated. It was there decided that their emancipation was complete and legal and the mortgage executed by them therefore valid, the Civil Code providing for such emancipation not having been repealed or superseded by the Code of Civil Procedure—this being the basic contention.

Other defenses are, however, set up which were more or less mingled with defenses of other parties to the suit who are not here. Those special to Joaquin and Zoilo Ibanez were, as separated by the Supreme Court: (1) The pendency of another suit, and (2) a former judgment.

(1) Under this it was urged that the suit for the annulling of the mortgage (case No. 230) had been submitted for adjudication and had not been disposed of. Identity was hence asserted between the two actions and it was insisted that the second should have awaited the disposition of the first. The Supreme Court took a

different view, urged thereto by cases which it cited. But counsel say that if the mortgage had been declared null in the first action (No. 230) it could not have been foreclosed in the second (that at bar), as it would have encountered the plea of *res judicata*. If, however, the mortgage had been upheld in the first action the appellants would have been precluded from attacking it in the second. That the alternatives would have occurred may be conceded; one of them, indeed, has occurred and has demonstrated that appellants suffered no detriment from the ruling.

The appellant Isabel Palet assigns as error that the Supréme Court failed to hold (1) that her liability as surety of Aldecoa & Company had been extinguished in accordance with the provisions of article 1851 of the Civil Code, which provides that "The extension granted to the debtor by the creditor, without the consent of the surety, extinguishes the security." (2) Refused to order for her benefit that the property of the company should be exhausted before resort be had to her property for satisfaction of the bank's claim.

It will be observed at once that the defenses have some dependence upon questions of fact upon which the two courts below concurred. From article 1851 of the Civil Code, abstractly considered, nothing can be deduced. Both the trial and Supreme Courts held that "the mere failure to bring an action upon a credit, as soon as the same or any part of it matures, does not constitute an extension of the term of the obligation." And it was further held that the extension, to produce the extinction of the liability, "must be based on some new agreement by which the creditor deprives himself of the right to immediately enforce the claim." This interpretation of the local courts of the local law we defer to. The construction, moreover, expresses the rule that obtains in other jurisdictions.

As to the other assignment of error the court replied that Isabel Palet did not deny that as a member of the firm of Aldecoa & Company she was liable with the company and that, besides, the trial court had directed that the mortgaged properties, including the properties mortgaged by her, should be sold under foreclosure in the event the company should not pay into court the amount of the judgment within the time designated for the purpose.

Counsel for appellee, however, admits that by clerical error the judgment is made to run "against the company and Isabel Palet jointly and severally and does not in terms express the subsidiary character" of her liability, and he therefore does not oppose a modification of the judgment to conform to the opinion of the trial court, that is, "that save as regards the foreclosure of the mortgage no execution shall issue against Isabel Palet until after the exhaustion of the assets of the principal debtor [the company]—which, by the way," counsel adds, "is a mere formality, as there are no such assets available, Aldecoa & Company being notoriously insolvent, as stated by the Supreme Court in its decision." Opposing counsel may not be of this opinion and we therefore modify the judgment as indicated, and, as modified, it is

Affirmed.

DICKINSON, AS RECEIVER OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *v.* STILES.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 735. Argued April 18, 19, 1918.—Decided April 29, 1918.

There is no inconsistency between the Employers' Liability Act and the application to cases arising under it in the state court of a general state law giving the attorney a lien on his client's cause of action and rendering the defendant directly liable to the attorney.

Where this question was called to the attention of the state trial and supreme courts and discussed by the latter, upon an intervention of the attorney in an action wherein the complaint stated a case under the act, this court has jurisdiction by writ of error to review the judgment sustaining the lien.

137 Minnesota, 410, affirmed.

THE case is stated in the opinion.

Mr. Edward S. Stringer, with whom *Mr. McNeil V. Seymour*, *Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* were on the briefs, for plaintiff in error.

Mr. George H. Lamar for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to correct a judgment of the Supreme Court of Minnesota which sustained the validity of a statute of the State held applicable to this case and alleged by the plaintiff in error to be repugnant to the Constitution and laws of the United States when so applied. The facts that raise the question are simple. One Holloway sued the plaintiff in error under the Employers' Liability Act for personal injuries and engaged the de-

fendant in error, Stiles, as his attorney, agreeing to pay him one-third of the amount recovered by suit or settlement. The statutes of Minnesota give the attorney a lien upon the cause of action. Gen. Stats. of 1913, § 4955. Before trial the plaintiff in error settled by paying $6,500. Stiles intervened in the cause and claimed his fee pursuant to his contract. There was a trial which ended in a judgment for Stiles—the trial Court ruling that the Minnesota statute was effective to impose a lien upon a cause of action arising under the Act of Congress relating to the liability of carriers by railroad to their employees. April 22, 1908, c. 149, 35 Stat. 65. April 5, 1910, c. 143, 36 Stat. 291. The Supreme Court of the State sustained this ruling, 137 Minnesota, 410, and subsequently, without further discussion, affirmed the judgment for Stiles

It is argued for the defendant in error that it does not appear sufficiently in the record that the case turned upon the ruling supposed. But the original declaration was for an injury alleged to have been received in interstate commerce and, whatever the answer denied, that was the claim that was settled. The question was called to the attention of the trial Court and was discussed at length by the Supreme Court. We perceive no ground for the motion to dismiss.

Coming to the merits, cases that declare that the acts of Congress supersede all state legislation on the subject of the liability of railroad companies to their employees have nothing to do with the matter. The Minnesota statute does not meddle with that. It affects neither the amount recovered nor the persons by whom it is recovered, nor again the principles of distribution. It deals only with a necessary expense of recovery. Congress cannot have contemplated that the claims to which its action gave rise or power would be paid in all cases without litigation, or that suits would be tried by lawyers for nothing, yet

it did not regulate attorneys' fees. It contemplated suits in state courts and accepted state procedure in advance. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211. *Louisville & Nashville R. R. Co.* v. *Stewart*, 241 U. S. 261. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure. Before the Carmack Amendment it was held not to invalidate state legislation requiring, under a penalty, prompt settlement of claims for loss of freight in the State, *Atlantic Coast Line R. R. Co.* v. *Mazursky*, 216 U. S. 122; see *Charleston & Western Carolina Ry. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597; or, since that amendment, allowing in the costs a moderate attorney's fee for small claims unsuccessfully disputed, *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, although both laws affect commerce among the States.

The statutes referred to in the last cited cases imposed liability for an additional sum. The present one does not. We presume that it would not be contended that the Employers' Liability Act prevented the assignment of a judgment under it in such form as was allowed by the law of Minnesota, or that it allowed the defendant to disregard such an assignment after notice. Nor do we perceive any different rule for an assignment of judgment or cause of action by way of security, which under the Minnesota statute the contract with Holloway brought to pass. It is true that this security is made effectual by requiring payment to the attorney, *Davis* v. *Great Northern Ry. Co.*, 128 Minnesota, 354, 358, and this may be said to result in requiring the judgment debtor to split up the payment. But surely there is nothing in that liability, seemingly common to all Minnesota judgments, *Wheaton* v. *Spooner*, 52 Minnesota, 417, 423, that introduces an interference with the Act of Congress that otherwise would not exist. In cases where a partial assignment is provided for irrespective of attorneys' fees we

should not expect to hear the suggestion of such a point. The whole case is simply that the State allows the attorney employed to collect a claim to be subrogated to the rights of the claimant so far as to secure the attorney's fees. We see no reason why it should not.

Judgment affirmed.

E. H. EMERY & COMPANY *v.* AMERICAN REFRIGERATOR TRANSIT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 739. Argued April 19, 1918.—Decided April 29, 1918.

In respect of the removability to the District Court of an action against a refrigerator car company for damages of less than $3,000.00 to goods in interstate transit—

Held: (1) That an undertaking for proper care and service implied with the company's contract to furnish cars to the shipper could not be a basis for liability under the Carmack Amendment.

(2) Upon the theory that the car company and the railroad were partners as to the shipments, the former would become a common carrier *pro hac vice*, and the amount involved would be insufficient. Act of July 20, 1914, amending Jud. Code, § 28.

(3) Liability of the car company under a contract assuming liability of the railroad (if the shipper could avail of it), would not make the case one arising under the Act to Regulate Commerce.

(4) A charge that the car company, by furnishing improper cars and service, failed in duty owed to the railroad and to the public, and so caused the damage, if it did not make out the company a common carrier, stated no duty under the act but only one at common law.

Reversed.

THE case is stated in the opinion.

Mr. Chester W. Whitmore for appellant.

Mr. Fred W. Lehmann, Jr., for appellee, submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff, the appellant, brought a suit in a state court against the Chicago, Burlington and Quincy Railroad Company and the appellee. The original petition sought to charge both, as common carriers, under the Interstate Commerce Act, for damage to peaches caused by their being improperly stowed, handled and iced, amounting to less than $3,000. After a trial a judgment was entered for the railroad and it was held that under the Iowa Statutes the present appellee was entitled to be dismissed, as sued in the wrong county. Thereupon the plaintiff issued a garnishee process against the railroad as a debtor of the appellee, upon which the railroad made default. Then the appellee was dismissed "as to the personal action but not as to said proceeding *in rem*," and a time was allowed for the filing of a petition by the appellant. A petition calling itself "Substituted Petition" was filed on October 16, 1916, and a few days later in the same month a petition for removal to the District Court of the United States was presented, which was granted by the state court. A motion to remand was made and denied. The plaintiff stood upon its motion and declined to proceed farther, denying the jurisdiction of the Court, whereupon the petition was dismissed, judgment was entered for the defendant, an appeal was taken and it was certified that the appeal was taken solely upon the jurisdiction of the Court.

We are content to assume without deciding that the case, whether a new action or not, had become removable if the difficulties to be mentioned can be overcome. On this assumption the jurisdiction is maintained on the argument that the plaintiff seeks to impose liability upon the defendant through the provisions of the Interstate Commerce Act, the governing tariffs and an interstate bill of

lading issued by the Missouri, Kansas and Texas Railway Company of Texas. The amendment to the Judicial Code, § 28, by the Act of January 20, 1914, c. 11, 38 Stat. 278, prohibiting the removal from state courts of suits, under § 20 of the Act to Regulate Commerce, against common carriers for injury to property, where the matter in controversy does not exceed $3,000, is met by the fact that the substituted petition does not charge the defendant as a common carrier, and both parties now agree that it was not one. Hence, it is said, the suit can be removed irrespective of the amount involved. It becomes necessary therefore to inquire in what way the defendant is supposed to be liable under the acts of Congress. The substituted petition relies upon a contract between the defendant and the Missouri, Kansas and Texas road by which the former assumed liability for the damages of the kind alleged, or some of them, and the fact that the railroad was a party to the bills of lading and the governing interstate tariffs, although the appellee was not. It also relies upon an alleged contract between it and the defendant for the cars involved and an implied undertaking for proper care and service. This last ground and other similar ones may be laid on one side as they clearly are outside the scope of the statutes concerned. So may a count alleging a partnership with the Missouri, Kansas and Texas in these transactions, as that would mean that the defendant became a common carrier *pro hac vice* and so within the above amendment to the Judicial Code.

The chief if not the only way in which the acts of Congress are brought in so as to give color to the attempt to remove is through the subjection of the Missouri, Kansas and Texas to those acts. But that affects the defendant only by virtue of a contract between it and the road. If in some way unexplained a stranger to the contract is entitled to profit by it, the foundation is the contract, not the laws which fixed the liability of the railroad that the

defendant assumed. The laws did not operate upon the defendant by their own force but merely as a measure of the damages agreed to be paid. To follow the language of a somewhat different case, the contract "is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfillment is like the reference to a document that it adopts and makes part of itself." *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 303.

One count alleges that the defendant caused the damage as agent for the Missouri, Kansas & Texas road by furnishing cars with insufficient tanks, employing inexperienced men and defectively stowing and failing to ice the peaches, and that these acts "constituted misfeasance on the part of defendant of the duties it owed to its principal the M., K. & T. Ry. Co. of Texas, and to the public at large." If this is not disposed of by what we have said, then it states no duty under the Act to Regulate Commerce, but only one at common law. In no aspect can it be maintained that any count attempts to allege a primary liability of the defendant under the Act to Regulate Commerce otherwise than as carrier, and if sued as a carrier it cannot remove because the amount in controversy is too small.

Judgment reversed.

UNITED STATES EX REL. LOUISVILLE CEMENT COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 70. Argued March 14, 1918.—Decided April 29, 1918.

The provision of § 16 of the Act to Regulate Commerce that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," is not a mere statute of limitation but is jurisdictional.

The "cause of action accrues" to a shipper, within the meaning of this provision, when the unreasonable charges are paid, not when the shipment is received or delivered by the carrier.

It having been definitely settled by prior decisions of this court that the time when a "cause of action accrues" is the time when suit may first be legally instituted upon it, it must be assumed that Congress, in using that expression without qualifying words, adopted the meaning thus attached to it.

In the absence of other modes of judicial review, the Supreme Court of the District of Columbia has power to direct the Interstate Commerce Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared not to be within its jurisdiction.

42 App. D. C. 514, reversed.

THE case is stated in the opinion.

Mr. J. Van Dyke Norman, with whom *Mr. John S. Kelley, Jr.*, and *Mr. George H. Lamar* were on the brief, for plaintiff in error.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission.

MR. JUSTICE CLARKE delivered the opinion of the court.

The facts of this case are not disputed and are as follows:

By mistake in printing its tariff, the published rate of the Louisville & Nashville R. R. Co. on coal from mines in Kentucky to Speeds, Indiana, was increased on July 22, 1906, to $1.10 per ton from $1.00, which had been the rate before.

The mistake was not noticed and the old rate was charged and paid by relator (plaintiff in error) on shipments until the following February, when, the increased published rate being discovered, it was charged and collected until the next April, when the former rate was restored.

Promptly on April 19, 1907, the relator wrote the Interstate Commerce Commission, explaining the circumstances, and requesting that the railroad company be authorized to refund the overcharges paid, February 11th, to April 19, 1907, amounting to $595.65.

The Commission replied to this letter that if the railroad company would file with the Commission an admission that the rate had been increased through error and would ask for authority to make the refund, the subject would receive consideration.

This statement of the Commission was immediately communicated to the railroad company, but it refused to make the required admission of mistake and to request authority to make the refund until the full published rate was paid on shipments made before the mistake was discovered. This led to dispute and delay, with the result that these excess charges ($1,335.25) were not paid until February 1, 1911.

In the following November the relator filed its petition with the Commission asking for an order permitting the railroad company to refund the entire amount, in excess of the former rate, paid under the mistakenly published tariff.

The railroad company admitted that it never intended to increase the rate and consented that the reparation order prayed for should be issued.

The Commission found, as a matter of fact, that the mistakenly published rate of $1.10 was unreasonable to the extent that it exceeded $1.00 per ton, and then, holding that all complaints for the recovery of damages must be filed with the Commission within two years from the date of the delivery of the shipment, it ruled that the letter of the relator to the Commission of April 19, 1907, making claim for the overcharges which had been paid between February 11th, and April 10th, 1907, was sufficient to satisfy the law, and ultimately issued to the railroad company authority to pay this amount to the relator; but the Commission further held that the complaint for the recovery of the overcharges for the period prior to February 11th, although filed within nine months of the date of their payment, was not in time to meet the requirement of § 16 of the act that "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," and that "they [the overcharges] are therefore barred from our consideration."

The relator filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia, which petition was denied, and the judgment of the Court of Appeals for the District affirming this holding is here for review.

The lower courts arrived at their conclusion by holding that the Commission entertained jurisdiction over the portion of the relator's claim which was rejected; that in the exercise of that jurisdiction it held the claim to be barred and that this was an exercise of discretion committed by law to the Commission which is not subject to control by the writ of mandamus.

We think the courts fell into error in thus interpreting the language used by the Commission in its report.

As to the portion of the claim which we are considering, the report of the Commission is as follows:

"The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation of the Act: 'All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.'

"The Commission holds that the date when the cause of action accrues is the date of the delivery of the shipment. *Blinn Lumber Co.* v. *Southern Pacific Co.*, 18 I. C. C. Rep. 430. . . . No complaint was filed by complainant [relator] with reference to shipments made before February 1, 1907, until the petition here in question was filed on November 15, 1911, and these shipments had all been delivered more than four years before the filing of that petition. They [the overcharges] are therefore barred from our consideration."

The concluding sentence thus used by the Commission that "They [the overcharges] are therefore barred from our consideration," implies that in the opinion of the Commission the two-year provision of the 16th section of the act is a limitation upon its power, and that the construction which it gave to this limitation placed the claim we are considering so beyond its jurisdiction that it could not consider it, and reference to the case cited as authority for its conclusion, *Blinn Lumber Co.* v. *Southern Pacific Co.*, 18 I. C. C. 430, makes it clear that such was the intended holding. In that case the Commission expresses its conclusion in this form:

"After careful consideration of the contentions of all parties . . . as to the right of the complainant" (after two years) "to maintain this proceeding for reparation before the Commission, it is our conclusion that we are *without power* to grant the relief prayed for."

And in *Anaconda Copper Mining Co.* v. *Chicago & Erie*

R. R. Co., 19 I. C. C. 592, decided seven months later, the Commission makes a yet more emphatic announcement of its views upon the subject, saying:

"In this report only such shipments will be considered as moved within two years from the time the complaint embracing them was filed, and with respect to shipments moving prior to such two-year period we think it proper to state that, following the spirit as well as the letter of the limitation clause contained in section 16 of the act, we believe *we are without jurisdiction*, and therefore we will not make any finding whatever concerning such shipments or the rates and charges assessed thereon."

It is thus made very clear that the holding of the Commission was, not that having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation but is jurisdictional,—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion (*Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544). That such was the opinion of this court was clearly intimated in *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the Court of Claims (*Ford* v. *United States*, 116 U. S. 213; *Finn* v. *United States*, 123 U. S. 227, 232; *United States* v. *Wardwell*, 172 U. S. 48, 52).

That the Supreme Court of the District of Columbia,

in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474. If the Commission did so err, on the authority of many decisions, among them *Ex parte Russell*, 13 Wall. 664; *Ex parte Schollenberger*, 96 U. S. 369; *Hollon Parker, Petitioner*, 131 U. S. 221; *In re Grossmayer*, 177 U. S. 48, and *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, 485, the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision cannot be reviewed on appeal or writ of error.

There remains the question, Did the Commission place an erroneous interpretation upon the scope of its jurisdiction under this two-year provision in § 16 of the act, in excluding the claim which we have before us from its consideration?

This provision first appears in an amendment to the act, approved June 29, 1906, § 5, c. 3591, 34 Stat. 590; and in January, 1908, the Commission published as its construction of the limitation the following, viz:

"A cause of action accrues, as that phrase is used in the act, on the date the freight charges are actually paid."

The decisions of the Commission show (15 I. C. C. 201, 235, 533; 16 I. C. C. 385) that it adhered to this construction until May, 1910, when, in *Blinn Lumber Co.* v. *Southern Pacific Co.*, 18 I. C. C. 430, it changed its ruling and adopted the holding that the cause of action accrued when the shipment was delivered.

This change, as the report of the Commission shows, resulted not from any modification of opinion as to the meaning of the language used but from the conclusion of a majority of its members that such interpretation was necessary to give effect to other provisions of the act, especially those relating to rebates and undue preferences.

But this two-year provision, obviously enough, relates only to the recovery of money damages, and if Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression "from the time the cause of action accrues." And in this connection we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it (*Amy* v. *Dubuque*, 98 U. S. 470, 474; *United States* v. *Taylor*, 104 U. S. 216, 222; *Rice* v. *United States*, 122 U. S. 611, 617) and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familar expression should be given the well understood meaning which had been given to it by this court. We therefore conclude, as was held, without special discussion of the point, in *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 666, 668, which in this respect really rules the case before us, that the proper construction of this jurisdictional provision requires that the cause of action of the shipper in this case shall be held not to have accrued until payment had been made of the unreasonable charges, and that, therefore, the interpretation which the Commission placed upon its jurisdictional power is erroneous.

The unusual and purely fortuitous circumstance, that the character of this jurisdictional limitation on the power of the Commission chances to be such that the giving of a correct construction to it must result in determining the character of the decision which the Commission must render when the case is returned to it, cannot affect the power of this court or that of the lower

courts to define what that jurisdiction is under the act of Congress or the duty of the Commission to accept and act upon such definition when announced.

It results that the judgment of the Court of Appeals must be reversed and that the case must be remanded to the Supreme Court of the District of Columbia, with direction that a writ of mandamus issue to the Commission, directing that it proceed to dispose of the claim in controversy under the construction placed upon its jurisdiction by this opinion.

Reversed.

DECISIONS PER CURIAM, FROM MARCH 4, 1918, TO MAY 6, 1918, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 489. GLASGOW NAVIGATION COMPANY, LTD., APPELLANT, *v.* MUNSON STEAMSHIP LINE. Appeal from the United States Circuit Court of Appeals for the Second Circuit. Motion to dismiss or affirm submitted February 4, 1918. Decided March 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) § 128, Judicial Code; *Oregon Ry. & Nav. Co.* v. *Balfour*, 179 U. S. 55. See *Macfadden* v. *United States*, 213 U. S. 288; *Chott* v. *Ewing*, 237 U. S. 197. (2) § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, § 6, c. 448, 39 Stat. 726. See *Glasgow Nav. Co., Ltd.*, v. *Munson S. S. Co.*, 243 U. S. 643. *Mr. J. Parker Kirlin*, *Mr. John M. Woolsey* and *Mr. Cletus Keating* for appellant. *Mr. John W. Griffin* for appellee.

No. 179. FORD MOTOR COMPANY, APPELLANT, *v.* JOHN S. CHAMBERS, AS CONTROLLER OF THE STATE OF CALIFORNIA, ET AL. Appeal from the District Court of the United States for the Northern District of California. Argued February 1, 1918. Decided March 4, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269; *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481. *Mr. W. F. Williamson*, *Mr. Alfred Lucking* and *Mr. L. B. Robertson* for appellant. *Mr. U. S. Webb* and *Mr. Raymond Benjamin*, for appellees, submitted.

No. 476. STEAMSHIP BOWDOIN COMPANY, PLAINTIFF IN ERROR, *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. In error to the Supreme Court of the State of California. Argued January 21, 1918. Decided March 4, 1918. *Per Curiam.* Judgment reversed upon the authority of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Clyde Steamship Co.* v. *Walker*, 244 U. S. 255. *Mr. Edward J. McCutchen* and *Mr. Ira A. Campbell* for plaintiff in error. *Mr. Christopher M. Bradley* for defendants in error.

Nos. 474 AND 475. ALASKA PACIFIC STEAMSHIP COMPANY, PLAINTIFF IN ERROR, *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. In error to the Supreme Court of the State of California. March 4, 1918. *Per Curiam.* Stipulations of counsel to the effect that the same judgments may be entered in these cases as in case No. 476, (next *supra*) having been filed, the judgments are therefore reversed and the cases remanded for further proceedings. *Mr. Ira A. Campbell* and *Mr. Edward J. McCutchen* for plaintiff in error. *Mr. Christopher M. Bradley* for defendants in error.

No. 539. JOHN KNOELL ET AL., PLAINTIFFS IN ERROR, *v.* UNITED STATES. In error to the United States Circuit Court of Appeals for the Third Circuit. Motion to dismiss submitted February 4, 1918. Decided March 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Macfadden* v. *United States*, 213 U. S. 288; *Friedman* v. *United States*, 244 U. S. 643. *Mr. R. O. Moon* and *Mr. William A. Gray* for plaintiffs in error. *The Solicitor General* for the United States.

No. 148. PUGET SOUND TRACTION, LIGHT & POWER COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* FRED W. NEWELL ET AL., COMMISSIONERS, ETC. In error to the Supreme Court of the State of Washington. Argued January 23, 24, 1918. Decided March 4, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) *First National Bank* v. *Estherville*, 215 U. S. 341, 346; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Roller* v. *Murray*, 234 U. S. 738; (2) *St. Anthony Falls Water Co.* v. *Board of Water Commissioners*, 168 U. S. 349, 358, 370–371; *Joy* v. *St. Louis*, 201 U. S. 322, 342; *Weems Steamboat Co.* v. *People's Co.*, 214 U. S. 345, 355; (3) *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 105; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600; *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 658. *Mr. James B. Howe*, for plaintiffs in error, submitted. *Mr. W. G. McLaren, Mr. James C. Hering* and *Mr. John B. Shorett* for defendants in error.

No. 767. HUGO YANYAR, PLAINTIFF IN ERROR, *v.* UNITED STATES; and

No. 768. OTTO YANYAR, PLAINTIFF IN ERROR, *v.* UNITED STATES. In error to the District Court of the United States for the District of Rhode Island. Motion to dismiss submitted March 4, 1918. Decided March 11, 1918. *Per Curiam.* Judgments affirmed upon the authority of *Selective Draft Law Cases*, 245 U. S. 366. *Mr. Walter Nelles* for plaintiffs in error. *The Solicitor General* for the United States.

No. 196. ANNA MARTIN, ADMINISTRATRIX, ETC., PLAINTIFF IN ERROR, *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. In error to the Supreme Court

of the State of Wisconsin. Argued March 15, 1918. Decided March 18, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 355; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. Walter L. Gold* and *Mr. Henry Mahoney* for plaintiff in error. *Mr. H. J. Killilea*, *Mr. C. H. Van Alstine* and *Mr. Rodger M. Trump* for defendant in error.

No. 858. RHODES E. CAVE ET AL., PLAINTIFFS IN ERROR, *v.* STATE OF MISSOURI EX REL. JAMES P. NEWELL. In error to the Supreme Court of the State of Missouri. Motion to dismiss submitted March 11, 1918. Decided March 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, c. 448, 39 Stat. 726; *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; (2) *Wilson* v. *North Carolina*, 169 U. S. 586, 592; *Taylor & Marshall* v. *Beckham*, 178 U. S. 548, 576. *Mr. George B. Webster*, *Mr. Elliott W. Major*, *Mr. Charles G. Revelle* and *Mr. Selden P. Spencer* for plaintiffs in error. *Mr. George F. Haid* and *Mr. Frank H. Sullivan* for defendant in error.

No. 188. OLIVER H. SMITH, JR., PLAINTIFF IN ERROR, *v.* WASHINGTON-SOUTHERN RAILWAY COMPANY. In error to the Court of Appeals of the District of Columbia. Argued March 13, 1918. Decided March 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Macfarland* v. *Brown*, 187 U. S. 239, 246; *Mac-*

farland v. *Byrnes*, 187 U. S. 246; *Earle* v. *Myers*, 207 U. S. 244; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 418–419. *Mr. Ralph D. Fleharty* and *Mr. J. S. Easby-Smith* for plaintiff in error. *Mr. Frederic D. McKenney*, *Mr. J. S. Flannery*, *Mr. G. B. Craighill* and *Mr. W. C. Carpenter* for defendant in error.

No. 187. JOHN GUND BREWING COMPANY, APPELLANT, *v.* GREAT NORTHERN RAILWAY COMPANY ET AL. Appeal from the District Court of the United States for the District of Minnesota. Argued March 13, 1918. Decided March 18, 1918. *Per Curiam.* Judgment affirmed upon the authority of (1) *The Cherokee Tobacco*, 11 Wall. 616, 624; *Whitney* v. *Robertson*, 124 U. S. 190, 194; *Ward* v. *Race Horse*, 163 U. S. 504, 511; (2) *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188. See *Perrin* v. *United States*, 232 U. S. 478, 483–485. (3) *Johnson* v. *Gearlds*, 234 U. S. 422. *Mr. Frederick W. Zollman*, *Mr. Levi Cooke*, *Mr. Louis W. Frankel* and *Mr. Robert Crain* for appellant. *Mr. Assistant Attorney General Warren* for appellees.

No. 810. EDWARD JEFFERSON BRYAN, PLAINTIFF IN ERROR, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. In error to the United States Circuit Court of Appeals for the Eighth Circuit. Motion to dismiss or affirm submitted March 4, 1918. Decided March 18, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477; *Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618; *Shulthis* v. *McDougal*, 225 U. S. 561; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 146–147. Petition for writ of certiorari denied.

Mr. Shepard Barclay for plaintiff in error. *Mr. Henry L. Stone, Mr. Edward S. Jouett* and *Mr. Harold R. Small* for the defendant in error.

No. 320. ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* MRS. MARSHALL LANIS, ADMINISTRATRIX OF MARSHALL LANIS, DECEASED. In error to the Supreme Court of the State of Louisiana. Motion to dismiss or affirmed submitted March 11, 1918. Decided March 18, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576; *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 221; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290, 293–294. *Mr. Gustave Lemle, Mr. Hunter C. Leake, Mr. Blewett Lee* and *Mr. R. V. Fletcher* for plaintiff in error. *Mr. Girault Farrar* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF WILLIAM H. BLYMYER, PETITIONER. Submitted March 4, 1918. Decided March 18, 1918. Motion for leave to file a petition for writ of mandamus denied. *Mr. William H. Blymyer pro se.*

No. 115. GRAND TRUNK WESTERN RAILWAY COMPANY, APPELLANT, *v.* UNITED STATES. Appeal from the Court of Claims. Argued March 21, 1918. Decided March 25, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 242, Judicial Code. *Mr. L. T. Michener* for appellant. *Mr. Assistant Attorney General Thompson* for the United States.

No. 728. VALENTINE T. COLLARD, ADMINISTRATOR OF THE ESTATE OF SAMUEL T. COLLARD, DECEASED, PLAINTIFF IN ERROR, *v.* PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY. In error to the Court of Appeals of the State of Kentucky. Motion to dismiss submitted March 11, 1918. Decided March 25, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) § 237, Judicial Code, as amended by the Act of Congress of September 6, 1916, c. 448, § 6, 39 Stat. 726; (2) *Schlosser* v. *Hemphill*, 198 U. S. 173; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe*, 222 U. S., 185; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99. *Mr. Matthew O'Doherty* for plaintiff in error. *Mr. William W. Crawford, Mr. Edmund F. Trabue* and *Mr. John C. Doolan* for defendant in error.

No. 203. BALTIMORE & OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* JAMES H. SMITH. In error to the Court of Appeals of the State of Kentucky. Argued March 18, 19, 1918. Decided March 25, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, 576; *Illinois Surety Co.* v. *United States*, 240 U. S. 214, 221; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290, 293–294; (2) *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 355; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. William W. Crawford, Mr. Edmund F. Trabue* and *Mr. J. C. Doolan* for plaintiff in error. *Mr. Eugene Hubbard* for defendant in error.

No. 228. FRANK MCKNIGHT, PLAINTIFF IN ERROR, *v.* STATE OF NEW MEXICO. In error to the Supreme Court

of the State of New Mexico. Argued March 20, 1918. Decided March 25, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *McCorquodale* v. *Texas*, 211 U. S. 432, 437; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399; *St. Louis & San Francisco R. R. Co.* v. *Shepherd*, 240 U. S. 240, 241; *Bilby* v. *Stewart*, *ante*, 255. *Mr. C. O. Thompson* and *Mr. William A. Dunn* for plaintiff in error. *Mr. Harry L. Patton*, for defendant in error, submitted.

No. 232. H. A. Moss and J. F. Bradford, Plaintiffs in Error, *v.* C. C. Moore et al. In error to the Supreme Court of the State of California. Argued March 21, 1918. Decided March 25, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Thomas* v. *Iowa*, 209 U. S. 258; *Appleby* v. *Buffalo*, 221 U. S. 524, 529; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134. *Mr. A. E. Shaw*, for plaintiffs in error, submitted. *Mr. E. S. Pillsbury*, *Mr. William F. Herrin*, *Mr. Alexander Britton*, *Mr. Evans Browne*, *Mr. Julius Kahn*, *Mr. Burke Corbet* and *Mr. John R. Selby* for defendants in error.

No. —. Original. *Ex parte:* In the Matter of Hyman L. Sigelschiffer, Petitioner. Submitted March 27, 1918. Decided April 1, 1918. Motion for leave to file petition for a writ of mandamus denied. *Mr. Morris G. Michaels* for petitioner.

No. 239. James F. Taylor et al., Appellants, *v.* United States. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. Submitted March 20, 1918. Decided April 15, 1918. *Per Curiam.*

Judgment affirmed upon the authority of *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 402–405; *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 575, 576. *Mr. R. E. Milling* and *Mr. E. H. Randolph* for appellants. *Mr. Assistant Attorney General Kearful* for the United States.

No. 254. CENTRAL OF GEORGIA RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* BIRDIE V. DELOACH. In error to the Court of Appeals of the State of Georgia. Argued March 28, 1918. Decided April 15, 1918. *Per Curiam.* Judgment reversed with costs upon the authority of *Pennsylvania Co.* v. *Donat*, 239 U. S. 50; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260. *Mr. T. M. Cunningham, Jr.*, for plaintiff in error. *Mr. Edgar J. Oliver* and *Mr. Francis M. Oliver* for defendant in error.

No. 598. JAMES S. HOPKINS, AS RECEIVER, ETC., PLAINTIFF IN ERROR, *v.* UNITED STATES OF AMERICA, SUING FOR THE USE AND BENEFIT OF ELLINGTON & GUY (INC.) ET AL. In error to the District Court of the United States for the Eastern District of North Carolina. Motion to dismiss or affirm submitted March 25, 1918. Decided April 15, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of *United States* v. *Congress Construction Co.*, 222 U. S. 199. *Mr. Mark W. Brown* and *Mr. Albert J. Hopkins* for plaintiff in error. *Mr. A. B. Dickinson* for defendants in error.

No. 335. DONALD A. CURRAN, PLAINTIFF IN ERROR, *v.* CHICAGO SHORT LINE RAILWAY COMPANY. In error to the

Appellate Court, First District of the State of Illinois. Motion to dismiss submitted April 15, 1918. Decided April 22, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 566–567. *Mr. Morse Ives* for plaintiff in error. *Mr. William Rothmann* for defendant in error.

No. 495. EDWARD B. PRYOR AND EDWARD F. KEARNEY, RECEIVERS OF THE WABASH RAILROAD COMPANY, PLAINTIFFS IN ERROR, *v.* LAURA CHRISTY, ADMINISTRATRIX OF THE ESTATE OF EDWARD F. CHRISTY, DECEASED. In error to the Kansas City Court of Appeals of the State of Missouri. Motion to dismiss submitted April 15, 1918. Decided April 22, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. *Mr. James L. Minnis* for plaintiffs in error. *Mr. Bruce Barnett* for defendant in error.

No. 799. GEORGE F. MONTGOMERY, APPELLANT, *v.* ARTHUR WOODS, POLICE COMMISSIONER OF THE CITY OF NEW YORK. Appeal from the District Court of the United States for the Southern District of New York. Argued April 19, 1918. Decided April 22, 1918. *Per Curiam.* Judgment affirmed with costs upon the authority of (1) *Munsey* v. *Clough*, 196 U. S. 364, 373–374; *Appleyard* v. *Massachusetts*, 203 U. S. 222; *McNichols* v. *Pease*, 207 U. S. 100; *Biddinger* v. *Commissioner of Police*, 245 U. S. 128; (2) *Munsey* v. *Clough*, 196 U. S. 364, 373; *Pierce* v. *Creecy*, 210 U. S. 387, 401, 402, 404–405; *Drew* v. *Thaw*, 235 U. S. 432, 439–440. *Mr. Herbert Noble* for

appellant. *Mr. Robert S. Johnstone* and *Mr. Edmund K. Trent* for appellee.

No. 650. CLARENCE F. BIRDSEYE, APPELLANT, *v.* ARTHUR WOODS, POLICE COMMISSIONER OF THE CITY OF NEW YORK; and

No. 651. KELLOGG BIRDSEYE, APPELLANT, *v.* ARTHUR WOODS, POLICE COMMISSIONER OF THE CITY OF NEW YORK. Appeals from the District Court of the United States for the Southern District of New York. Argued April 19, 1918. Decided April 22, 1918. *Per Curiam.* Judgments affirmed with costs upon the authority of *Munsey* v. *Clough*, 196 U. S. 364, 373; *Pierce* v. *Creecy*, 210 U. S. 387, 401, 402, 404, 405; *Drew* v. *Thaw*, 235 U. S. 432, 439–440. *Mr. Charles L. Craig* for appellants. *Mr. Robert S. Johnstone* and *Mr. Edmund K. Trent* for appellee.

No. 259. D. E. FOOTE & COMPANY, INC., ET AL., PLAINTIFFS IN ERROR, *v.* EMERSON C. HARRINGTON, GOVERNOR OF THE STATE OF MARYLAND, ET AL. In error to the Court of Appeals of the State of Maryland. Argued April 23, 24, 1918. Decided April 29, 1918. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Eustis* v. *Bolles*, 150 U. S. 361; *Leathe* v. *Thomas*, 207 U. S. 93; *Holden Land Co.* v. *Inter-State Trading Co.*, 233 U. S. 536, 541; *Bilby* v. *Stewart*, *ante*, 255. *Mr. George Whitelock* for plaintiffs in error. *Mr. Ogle Marbury* and *Mr. Albert C. Ritchie* for defendants in error.

No. 263. CHICAGO, KALAMAZOO & SAGINAW RAILWAY COMPANY, PLAINTIFF IN ERROR, *v.* GALE KINDLESPARKER.

In error to the United States Circuit Court of Appeals for the Sixth Circuit. Argued April 24, 25, 1918. Decided April 29, 1918. *Per Curiam.* Judgment reversed with costs, and case remanded to the District Court of the United States for the Western District of Michigan for further proceedings, upon the authority of *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353. *Mr. Stuart E. Knappen* and *Mr. Frank E. Robson* for plaintiff in error. *Mr. Charles F. Hext* and *Mr. H. Monroe Dunham* for defendant in error.

No. 256. MRS. LAURA L. BUNCH, PETITIONER, *v.* J. S. MALONEY, AS TRUSTEE IN BANKRUPTCY FOR THE T. H. BUNCH COMMISSION COMPANY, BANKRUPT. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Argued April 23, 1918. Decided April 29, 1918. *Per Curiam.* Judgment reversed with costs, and case remanded to the District Court of the United States for the Eastern District of Arkansas for further proceedings, upon the authority of *Martin* v. *Commercial National Bank*, 245 U. S. 513. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. J. F. Loughborough* and *Mr. V. M. Miles* for petitioner. *Mr. R. S. Wimberly* and *Mr. J. M. Moore* for respondent.

No. 478. MARY A. PARMELEE, AS ADMINISTRATRIX OF THE ESTATE OF DAVID PARMELEE, DECEASED, PLAINTIFF IN ERROR, *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY. In error to the Supreme Court of the State of Washington. Motion to affirm or transfer to summary docket submitted April 24, 1918. Decided April 29, 1918. *Per Curiam.* Judgment affirmed with

costs upon the authority of *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222; *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 355; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466; *Baltimore & Ohio R. R. Co.* v. *Whitacre*, 242 U. S. 169. *Mr. Arthur E. Griffin* and *Mr. Thomas B. McMartin* for plaintiff in error. *Mr. Heman H. Field* for defendant in error.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM MARCH 4, 1918, TO MAY 6, 1918.

No. 808. JOSEPH SCHLITZ BREWING COMPANY, PETITIONER, *v.* HOUSTON ICE & BREWING COMPANY ET AL. March 4, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Russell Jackson* for petitioner. No appearance for respondents.

No. 831. ERIE RAILROAD COMPANY, PETITIONER, *v.* JOHN R. SHUART ET AL., ETC. March 4, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Thomas Watts* for petitioner. *Mr. Reeves T. Strickland* for respondents.

No. 821. MACBETH-EVANS GLASS COMPANY, PETITIONER, *v.* GENERAL ELECTRIC COMPANY. March 4, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph Wilby* and *Mr. Paul Synnestvedt* for petitioner.

Mr. Frederick P. Fish, *Mr. W. K. Richardson* and *Mr. William W. Dodge* for respondent.

No. 843. JOHN L. CREVELING, PETITIONER, *v.* J. T. NEWTON, COMMISSIONER OF PATENTS. March 4, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Delos G. Haynes*, *Mr. Robert S. Blair* and *Mr. Paul A. Blair* for petitioner. No brief filed for respondent.

No. 846. ERIE RAILROAD COMPANY, PETITIONER, *v.* EDWIN J. HILT, JR., AN INFANT, BY HIS NEXT FRIEND, ET AL. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted. *Mr. George S. Hobart*, *Mr. F. D. McKenney* and *Mr. Gilbert Collins* for petitioner. *Mr. James J. Murphy* and *Mr. Raymond Dawson* for respondents.

No. 851. EDWARD B. PRYOR ET AL, AS RECEIVERS, ETC., PETITIONERS, *v.* ALLEGA WILLIAMS. March 11, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Missouri granted. *Mr. James L. Minnis* for petitioners. No appearance for respondent.

No. 885. FRANK A. BONE, PETITIONER, *v.* COMMISSIONER OF MARION COUNTY. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court

of Appeals for the Seventh Circuit granted. *Mr. Clarence E. Mehlhope* and *Mr. Arthur H. Ewald* for petitioner. *Mr. V. H. Lockwood* for respondent.

No. 823. JACOB ROUSS, PETITIONER, *v.* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. March 11, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Charles E. LeBarbier* for petitioner. *Mr. Einar Chrystie* and *Mr. George W. Wickersham* for respondent.

No. 832. ALFRED T. PETERSON, PETITIONER, *v.* UNITED STATES. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. A. Ayers* for petitioner. *The Solicitor General* for the United States.

No. 837. ANNE MARIE BERG ET AL., PETITIONERS, *v.* CHARLES D. BAKER. March 11, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Halvor Steenerson* for petitioners. No appearance for respondent.

No. 842. MATTIE RIEGER, PETITIONER, *v.* ROBERT ABRAMS. March 11, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied. *Mr. Dallas V. Halverstadt* for petitioner. No appearance for respondent.

No. 850. CAPITAL SAVINGS BANK & TRUST COMPANY, PETITIONER, *v.* INHABITANTS OF THE TOWN OF FRAMINGHAM. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals, for the First Circuit denied. *Mr. Charles F. Choate, Jr.*, and *Mr. Samuel E. Swayze* for petitioner. *Mr. Alfred Hemenway* and *Mr. Edwin H. Abbot, Jr.*, for respondents.

No. 854. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER, *v.* L. J. RAY, ADMINISTRATRIX, ETC. March 11, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. R. J. Roberts, Mr. M. L. Bell, Mr. Thomas P. Littlepage*, and *Mr. Sidney F. Taliaferro* for petitioner. No appearance for respondent.

No. 855. McCLINTIC-MARSHALL CONSTRUCTION COMPANY, PETITIONER, *v.* ELNORA FORGY. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. O. H. Dean, Mr. W. D. McLeod* and *Mr. H. M. Langworthy* for petitioner. *Mr. Daniel V. Howell* for respondent.

No. 867. HAMBURG-AMERIKANISCHE-PACKETFAHRT AKTIEN-GESELLSCHAFT, ETC., ET AL., PETITIONERS, *v.* UNITED STATES. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Walter C. Noyes* for petitioners. *The Solicitor General* and *Mr. Assistant Attorney General Warren* for the United States.

No. 874. ILLINOIS CENTRAL RAILROAD COMPANY, PETITIONER, *v.* ALLINE SKINNER, ADMINISTRATRIX, ETC. March 11, 1918. Petition for a writ of certiorari to the Court of Appeals of the State of Kentucky denied. *Mr. Robert V. Fletcher, Mr. Edmund F. Trabue, Mr. Blewett Lee* and *Mr. Charles K. Wheeler* for petitioner. *Mr. David A. Baer* for respondent.

No. 886. MICHIGAN CENTRAL RAILROAD COMPANY, PETITIONER, *v.* UNITED STATES. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Walter Dohany* and *Mr. Frank E. Robson* for petitioner. *The Solicitor General* and *Mr. Assistant to the Attorney General Todd* for the United States.

No. 896. GUARANTY TRUST COMPANY OF NEW YORK, PETITIONER, *v.* KINGDOM OF ROUMANIA. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank M. Patterson* and *Mr. John V. Morgan* for petitioner. *Mr. Joseph M. Hartfield* for respondent.

No. 898. GRAYSONIA-NASHVILLE LUMBER COMPANY ET AL., PETITIONERS, *v.* ALVIN D. GOLDMAN, TRUSTEE. March 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. H. S. Priest, Mr. Morton Jourdan* and *Mr. T. E. Francis* for petitioners. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. J. F. Loughborough* and *Mr. V. M. Miles* for respondent.

No. 810. EDWARD JEFFERSON BRYAN, PLAINTIFF IN ERROR, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. See *ante*, 651.

NO. 848. ALBERT G. DICKINSON, PETITIONER, *v.* O. & W. THUM COMPANY. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Roger W. Butterfield* and *Mr. Willard F. Keeney* for petitioner. *Mr. Fred L. Chappell* for respondent.

No. 849. A. K. ACKERMAN COMPANY, PETITIONER, *v.* O. & W. THUM COMPANY. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Roger W. Butterfield* and *Mr. Willard F. Keeney* for petitioner. *Mr. Fred L. Chappell* for respondent.

No. 845. VIAVI COMPANY, PETITIONER, *v.* VIMEDIA COMPANY ET AL. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John A. Barnes* for petitioner. *Mr. Frank T. Brown* for respondents.

No. 853. TATUM BROTHERS REAL ESTATE & INVESTMENT COMPANY, PETITIONER, *v.* W. E. SHENK. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

Mr. William P. Smith and *Mr. Frank B. Shutts* for petitioner. *Mr. Frederick M. Hudson* for respondent.

No. 857. JOHN FAIR NEW, PETITIONER, *v.* UNITED STATES. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied. *Mr. R. E. Ragland* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

No. 879. H. P. MEIKLEHAM, PETITIONER, *v.* MRS. VIRGINIA A. GRAFTON. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Arthur G. Powell* and *Mr. Robert C. Alston* for petitioner. *Mr. George E. Maddox* for respondent.

No. 880. JOHN PATERLINI ET AL., PETITIONERS, *v.* MEMORIAL HOSPITAL ASSOCIATION OF MONONGAHELA CITY, PA., ET AL. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur O. Fording* for petitioners. No appearance for respondents.

No. 882. UPPER HUDSON STONE COMPANY, PETITIONER, *v.* JOSEPH LESLIE WHITE ET AL. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr.*

Francis Martin for petitioner. *Mr. Mark Ash* for respondents.

No. 884. JUDSON HARMON ET AL., RECEIVERS, ETC., PETITIONERS, *v.* LUCINDA BARBER, ADMINISTRATRIX. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Morison R. Waite* and *Mr. John Randolph Schindel* for petitioners. *Mr. C. B. Matthews* for respondent.

No. 888. ARMANIS F. KNOTTS, PETITIONER, *v.* CLARK CONSTRUCTION COMPANY. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. J. Whinery* for petitioner. *Mr. Joseph W. Moses, Mr. Hamilton Moses* and *Mr. Walter Bachrach* for respondent.

No. 889. JAMES ALLEN, PETITIONER, *v.* CHICAGO & ALTON RAILROAD COMPANY. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George C. Otto* for petitioner. *Mr. Silas H. Strawn* and *Mr. Edward W. Everett* for respondent.

No. 907. L. B. BEARD ET AL., PETITIONERS, *v.* HORACE L. PAYNE ET AL. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Nathan A. Gibson* and *Mr. Joseph L. Hull* for petitioners. *Mr. George S. Ramsey, Mr. Edgar A. deMeules, Mr. Malcolm E. Rosser, Mr. Villard Martin* and *Mr. J. Berry King* for respondents.

No. 911. ED SPEAR, PETITIONER, *v.* UNITED STATES. March 18, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. W. Fordyce, Jr.*, and *Mr. Truman Post Young* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

No. 897. CRAIG MOUNTAIN LUMBER COMPANY, LIMITED, PETITIONER, *v.* JAMES SUMEY. March 25, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Idaho denied. *Mr. Jackson H. Ralston* for petitioner. *Mr. William R. Harr* and *Mr. Charles H. Bates* for respondent.

No. 863. LUIS HULLER ET AL., PLAINTIFFS IN ERROR, *v.* STATE OF NEW MEXICO ON THE RELATION OF THE NORTHWESTERN COLONIZATION & IMPROVEMENT COMPANY, OF CHIHUAHUA. March 25, 1918. Petition for a writ of certiorari to the Supreme Court of the State of New Mexico denied. *Mr. Walter D. Hawk, Mr. Samuel S. Holmes, Mr. A. B. Renehan, Mr. Charles A. Douglas* and *Mr. Jo V. Morgan* for petitioners. *Mr. James R. Garfield, Mr. D. J. Cable, Mr. Harry L. Patton* and *Mr. Francis C. Wilson* for respondent.

No. 870. FREDERIC W. GOUDY, PETITIONER, *v.* HENRY ALFRED HANSEN, EXECUTOR, ETC. March 25, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. E. W. Bradford* and *Mr. Charles E. Hughes* for petitioner. *Mr. Nathan Heard* for respondent.

No. 871. GRAND LODGE OF FREE AND ACCEPTED MASONS OF THE STATE OF MISSISSIPPI ET AL., PETITIONERS, *v.* VICKSBURG LODGE, NO. 26, OF FREE AND ACCEPTED MASONS ET AL. March 25, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Mr. Robert B. Mayes* for petitioners. *Mr. J. C. Bryson* for respondents.

No. 900. CINCINNATI NORTHERN RAILROAD COMPANY, PETITIONER, *v.* LEO GUY. March 25, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied. *Mr. Harry N. Quigley* for petitioner. *Miss Corinne L. Rice* and *Mr. Alonzo H. Ranes* for respondent.

No. 902. CITY OF CLEVELAND, PETITIONER, *v.* VIOLA M. NICHOLS. March 25, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Alfred Clun* for petitioner. *Mr. E. G. Guthery* for respondent.

No. 917. COOPER HEWITT ELECTRIC COMPANY, PETITIONER, *v.* GENERAL ELECTRIC COMPANY. March 25, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas B. Kerr* and *Mr. Parker W. Page* for petitioner. *Mr. John C. Pennie* for respondent.

No. 901. W. C. STERRETT, AS RECEIVER, ETC., PETITIONER, *v.* SECOND NATIONAL BANK OF CINCINNATI.

OHIO. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Forney Johnston* and *Mr. Edmund H. Dryer* for petitioner. No appearance for respondent.

No. 935. ERIK SANDBERG ET AL., PETITIONERS, *v.* JOHN MCDONALD, CLAIMANT, ETC. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Alex. T. Howard* and *Mr. J. W. Waguespack* for petitioners. *Mr. Palmer Pillans* for respondent.

No. 936. PAUL NIELSEN ET AL., PETITIONERS, *v.* RHINE SHIPPING COMPANY, CLAIMANT, ETC. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Silas B. Axtell* for petitioners. *Mr. Roscoe H. Hupper* for respondent.

No. 937. JOHN HARDY ET AL., PETITIONERS, *v.* SHEPARD & MORSE LUMBER COMPANY, CLAIMANT, ETC. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Silas B. Axtell* for petitioners. *Mr. Roscoe H. Hupper* for respondent.

No. 893. CONSOLIDATION COAL COMPANY, PETITIONER, *v.* CARRIE SALYER, ADMINISTRATRIX, ETC. April 1, 1918. Petition for a writ of certiorari to the United States Cir-

cuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward C. O'Rear* for petitioner. No appearance for respondent.

No. 906. COOPER GROCERY COMPANY, PETITIONER, *v.* G. H. PENLAND, TRUSTEE, ETC. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. Y. Cummings* for petitioner. *Mr. Charles A. Boynton* and *Mr. James D. Williamson* for respondent.

No. 908. MARYLAND CASUALTY COMPANY, PETITIONER, *v.* FIRST NATIONAL BANK OF MONTGOMERY, ALA. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William C. Prentiss, Mr. Walter L. Clark* and *Mr. F. S. Ball* for petitioner. *Mr. Horace Stringfellow, Mr. B. P. Crum* and *Mr. Leon Weil* for respondent.

No. 915. COMPANIA PALOMAS DE TERRENOS Y GANADOS ET AL., PETITIONERS, *v.* SIGMUND LINDAUER ET AL. April 1, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James R. Garfield, Mr. D. J. Cable* and *Mr. Francis C. Wilson* for petitioners. *Mr. Walter D. Hawk, Mr. Samuel S. Holmes, Mr. A. B. Renehan* and *Mr. Charles A. Douglas* for respondents.

No. 916. THOMAS J. EVANS, SOLE SURVIVING RECEIVER, ETC., PETITIONER, *v.* NATIONAL BANK OF SAVANNAH. April 15, 1918. Petition for a writ of certiorari to the

Court of Appeals of the State of Georgia granted. *Mr. Frederick T. Saussy* for petitioner. *Mr. William Garrard* and *Mr. Edward S. Elliott* for respondent.

No. 919. SOUTH COAST STEAMSHIP COMPANY, PETITIONER, *v.* J. C. RUDBACH. April 15, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Oliver Dibble* for petitioner. No appearance for respondent.

No. 914. WEST END STREET RAILWAY COMPANY, PETITIONER, *v.* JOHN F. MALLEY, COLLECTOR OF INTERNAL REVENUE. April 15, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Alex. Britton* and *Mr. Evans Browne* for petitioner. *The Solicitor General* for respondent.

No. 941. RENSSAELAER & SARATOGA RAILROAD COMPANY, PETITIONER, *v.* ROSCOE IRWIN, COLLECTOR OF INTERNAL REVENUE. April 15, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. G. B. Wellington* for petitioner. *The Solicitor General* for respondent.

No. 894. WHITE GULCH MINING COMPANY, PETITIONER, *v.* INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA ET AL. April 15, 1918. Petition for a writ of certiorari to the Supreme Court of the State

of California denied. *Mr. W. E. F. Deal, Mr. Charles F. Consaul* and *Mr. Charles C. Haltman* for petitioner. *Mr. Christopher M. Bradley* for respondents.

No. 899. FRANKLIN SHAW ET AL., APPELLANTS, *v.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. April 15, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles A. Towne* and *Mr. Duane E. Fox* for petitioners. *Mr. C. Edward Wright, Mr. Charles D. Mahaffie* and *The Attorney General* for respondent.

No. 912. TOM HOLLIS, PETITIONER, *v.* UNITED STATES. April 15, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Stone Hoskins* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

No. 913. SIMP PATTERSON, PETITIONER, *v.* UNITED STATES. April 15, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Stone Hoskins* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Fitts* for the United States.

No. 918. DENVER & RIO GRANDE RAILROAD COMPANY, PETITIONER, *v.* EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, ETC. April 15, 1918. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. John G. Milburn, Mr. William Wallace, Jr.*, and *Mr. Arthur J. Shores* for petitioner. *Mr. George Welwood Murray, Mr. J. F. Bowne* and *Mr. W. R. Begg* for respondent.

No. 923. J. C. HARKER, SUBSTITUTED BY CHARLES O. HARKER, ADMINISTRATOR, ETC., ET AL., PETITIONERS, *v.* BOARD OF SUPERVISORS OF GREENE COUNTY, IOWA, ET AL. April 15, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. O. M. Brockett* for petitioners. No appearance for respondents.

No. 964. LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, PETITIONER, *v.* BROOKLYN EASTERN DISTRICT TERMINAL. April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. *Mr. Roscoe H. Hupper* for petitioner. *Mr. Samuel Park* and *Mr. Henry E. Mattison* for respondent.

No. 610. CITIZENS BANK OF MICHIGAN CITY, IND., PLAINTIFF IN ERROR, *v.* MARY OPPERMAN. April 22, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Indiana denied. *Mr. Worth W. Pepple* and *Mr. Jeremiah B. Collins* for petitioner. *Mr. Samuel Parker* for respondent.

No. 921. NEW YORK CENTRAL RAILROAD COMPANY ET AL., PETITIONERS, *v.* CITY OF CHICAGO. April 22, 1918. Petition for a writ of certiorari to the Supreme Court of

the State of Illinois denied. *Mr. Robert J. Cary, Mr. F. Harold Schmitt, Mr. M. L. Bell, Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for petitioners. No appearance for respondent.

No. 922. FAIRBANKS, MORSE & COMPANY ET AL., PETITIONERS, *v.* AMERICAN VALVE & METER COMPANY ET AL. April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Fred L. Chappell* and *Mr. William S. Hodges* for petitioners. *Mr. Charles M. Cist* and *Mr. Dwight S. Marfield* for respondents.

No. 927. SAM SANGER ET AL., SURVIVING MEMBERS, ETC., ET AL., PETITIONERS, *v.* SARAH CATHARINE WOODWARD. April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles A. Boynton* for petitioners. No appearance for respondent.

No. 933. MARIANO LIM, PETITIONER, *v.* UNITED STATES. April 22, 1918. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Alex. Britton* and *Mr. Evans Browne* for petitioner. *The Solicitor General* and *Mr. Assistant Attorney General Warren* for the United States.

No. 939. C. S. DASHIELL, TRUSTEE, ET AL., PETITIONERS, *v.* LEWIS T. FITZHUGH, TRUSTEE, ETC. April 22, 1918. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter C. Chandler* for petitioners. No appearance for respondent.

No. 949. REDERIAKTIEBOLAGET AMIE, PETITIONER, *v.* UNIVERSAL TRANSPORTATION COMPANY (INC.). April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. *Mr. William J. Conlen* for petitioner. *Mr. J. Parker Kirlin* for respondent.

No. 952. UNITED STATES, PETITIONER, *v.* HENRY VEEDER. April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *The Solicitor General* for the United States. *Mr. John J. Healy* and *Mr. George P. McCabe* for respondent.

No. 962. COMMONWEALTH TRUST COMPANY OF PITTSBURGH, PETITIONER, *v.* FIRST-SECOND NATIONAL BANK OF PITTSBURGH ET AL. April 22, 1918. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. H. F. Stambaugh* and *Mr. John M. Freeman* for petitioner. *Mr. Alexander J. Barron* for respondents.

No. 963. JAMES O. HARRIS, PETITIONER, *v.* UNITED STATES. April 22, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Daniel W. Baker* and *Mr. Alva A. Andrews* for petitioner. No brief for the United States.

No. 950. BIRGE-FORBES COMPANY, PETITIONER, *v.* CARL R. HEYE. April 29, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Henry O. Head* for petitioner. *Mr. Newton Hance Lassiter* for respondent.

No. 932. FILER & STOWELL COMPANY, PETITIONER, *v.* DIAMOND IRON WORKS. April 29, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William G. Henderson* for petitioner. *Mr. Frank A. Whiteley* for respondent.

No. 954. GENERAL ELECTRIC COMPANY, PETITIONER, *v.* COOPER HEWITT ELECTRIC COMPANY. April 29, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John C. Pennie* for petitioner. *Mr. Thomas B. Kerr* and *Mr. Parker W. Page* for respondent.

No. 960. COMPAGNIE DE COMMERCE ET DE NAVIGATION D' EXTREME ORIENT, PETITIONER, *v.* HAMBURG-AMERIKA PACKETFAHRT ACTIENGESELLSCHAFT. April 29, 1918. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. W. A. Kincaid, Mr. Alex. Britton* and *Mr. Evans Browne* for petitioner. No appearance for respondent.

No. 965. GEORGE STUART, AS TRUSTEE, ETC., PETITIONER, *v.* ESTELLE MANEGOLD BEAVEN. April 29, 1918.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gustave F. Mertens* and *Mr. Benjamin P. Crum* for petitioner. No appearance for respondent.

No. 987. REDPATH LYCEUM BUREAU, PETITIONER, *v.* JOHN L. PICKERING, COLLECTOR OF INTERNAL REVENUE. April 29, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert M. Kales* and *Mr. Victor Elting* for petitioner. No brief for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MARCH 4, 1918, TO MAY 6, 1918.

No. 413. INTERBORO BREWING COMPANY (INC.), PETITIONER, *v.* STANDARD BREWING COMPANY OF BALTIMORE. On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. March 4, 1918. Dismissed with costs, on motion of counsel for petitioner. *Mr. Warren H. Small* and *Mr. George Ramsey* for petitioner. No appearance for respondent.

No. 331. DAVID GOLDSMITH, ET AL., PLAINTIFFS IN ERROR, *v.* ALFRED C. F. MEYER. In error to the St. Louis Court of Appeals of the State of Missouri. March 4, 1918. Dismissed, per stipulation. *Mr. David Goldsmith* for plaintiffs in error. *Mr. Hickman P. Rodgers* for defendant in error.

No. 631. DAVID GOLDSMITH ET AL., PLAINTIFFS IN ERROR, *v.* ALFRED C. F. MEYER. In error to the Supreme Court of the State of Missouri. March 4, 1918. Dismissed per stipulation. *Mr. David Goldsmith* for plaintiffs in error. *Mr. Hickman P. Rodgers* for defendant in error.

No. 229. PETER MARSHALL, PLAINTIFF IN ERROR, *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. In error to the Supreme Court of the State of Minnesota. March 18, 1918. Dismissed with costs, pursuant to the tenth rule. *Mr. Harlan E. Leach* for plaintiff in error. *Mr. McNeil V. Seymour* for defendant in error.

No. 779. OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, PLAINTIFF IN ERROR, *v.* THURSTON COUNTY; STATE OF WASHINGTON, ET AL. In error to the Supreme Court of the State of Washington. March 20, 1918. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Arthur C. Spencer* for plaintiff in error. No appearance for defendants in error.

No. 806. NAVY YARD ROUTE, PLAINTIFF IN ERROR, *v.* H. E. DEVLIN. In error to the District Court of the United States for the Western District of Washington. March 21, 1918. Dismissed, per stipulation. *Mr. Ira Bronson* for plaintiff in error. *Mr. Thomas R. Shepard* for defendant in error.

No. 746. JAMES HALLAGAN ET AL., PLAINTIFFS IN ERROR, *v.* SIMEON A. DOWELL. In error to the Supreme

Court of the State of Iowa. March 22, 1918. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. James P. Flick* for plaintiffs in error. No appearance for defendant in error.

No. 262. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR, *v.* ST. PAUL ASSOCIATION OF COMMERCE ET AL. In error to the Supreme Court of the State of Minnesota. March 28, 1918. Dismissed with costs, on motion of counsel for the plaintiffs in error. *Mr. Asa G. Briggs, Mr. E. C. Lindley, Mr. W. H. Bremner, Mr. James B. Sheean, Mr. McNeil V. Seymour, Mr. Edward M. Hyzer, Mr. Carl C. Wright, Mr. Charles W. Bunn, Mr. Charles Donnelly, Mr. F. W. Root* and *Mr. Alfred H. Bright* for plaintiffs in error. *Mr. Thomas D. O'Brien* for defendants in error.

No. 287. PEDRO GUTIERREZ, PLAINTIFF IN ERROR, *v.* WALTER B. GRANT, SOLE SURVIVING EXECUTOR OF THE WILL AND ESTATE OF FRANK B. COTTON, DECEASED. In error to the District Court of the United States for the Western District of Texas. April 1, 1918. Dismissed, per stipulation. *Mr. A. Seymour Thurmond* for plaintiff in error. *Mr. T. J. Beall* and *Mr. Walter B. Grant* for defendant in error.

No. ——. Original. *Ex parte:* IN THE MATTER OF THE UNITED STATES, PETITIONER. Motion for leave to file information for contempt submitted January 14, 1918. Discontinued April 15, 1918, on motion of *The Solicitor General* for the United States.

No. 296. MISSISSIPPI CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR, *v.* WADE LOTT. In error to the Supreme Court of the State of Mississippi. April 15, 1918. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. S. E. Travis* for plaintiff in error. No appearance for defendant in error.

No. 446. J. B. SHOWALTER ET AL., APPELLANTS, *v.* TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA ET AL. Appeal from the District Court of the United States for the Southern District of Florida. April 15, 1918. Dismissed with costs, on motion of counsel for appellants. *Mr. Clair D. Vallette* and *Mr. A. B. Quinton* for appellants. *Mr. Glenn Terrell* for appellees.

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VI. Privileges and Immunities under Art. IV, p. 691.
VII. Fourteenth Amendment.
(1) Notice and Hearing, p. 691.
(2) Liberty of Contract, p. 692.
(3) Privileges and Immunities of Citizens, p. 692.
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(5) Taxation, p. 693.
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See **Jurisdiction Police Power.**
As to relation of Congress to Elections in States, see **Elections.**

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I. **Division of National Powers.**

As to Original Jurisdiction of this Court, and power of other branches to sustain its exercise, see **Jurisdiction**, III, (1).

Who is a sovereign *de jure* or *de facto* of a foreign territory is a political question the determination of which by the political departments of government conclusively binds the judges. *Oetjen* v. *Central Leather Co.* 297
Ricaud v. *American Metal Co.* 304

II. **Agreements between States.**

1. Power of Congress to legislate for enforcement of contract between two States under the circumstances presented is not incompatible with grant of original jurisdiction to this court to entertain a suit on the same subject. Power of Congress also extends to creation of new judicial remedies to meet the exigency occasioned by judicial duty of enforcing judgment against a State under the circumstances presented. *Virginia* v. *West Virginia* 565

2. The power of Congress to grant or withhold assent to such contracts carries with it the plenary power to see to their enforcement when made operative by its sanction. *Id.*

3. Provisions prohibiting interstate agreements without consent of Congress and depriving States of army and war-making powers and vesting them in Congress, reviewed. *Id.*

4. *Quære:* Whether an agreement by acquiescence between States relative to boundary would be valid without consent of Congress? *Arkansas* v. *Tennessee* 158

III. **Commerce Clause.** See **Interstate Commerce Acts; Taxation.**

1. State law forbidding change of location of railway offices and shops *held* indirect burden on interstate commerce and within power of State. *International & G. N. Ry.* v. *Anderson Co.* 424

2. Order of state commission requiring stoppage of certain interstate trains at county seat of only 1500 population upheld, in view of statute, not directed adversely at interstate

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trains, but specifying train service to be supplied to all county seats and evidencing legislative estimate of county seat needs. *Gulf, Colorado &c. Ry.* v. *Texas* 58

3. Doubtful if order could be sustained from standpoint of local requirements of population merely. *Id.*

4. Need of fast time in competition with other railroads and in carrying mail *held* not to render order unduly burdensome to interstate commerce. *Id.*

5. Power to make such order may coexist with duty imposed on carriers by Hepburn Act and Act of June 18, 1910, subject to jurisdiction of Interstate Commerce Commission. *Id.*

6. Immunity of interstate commerce from state taxation is universal and covers every class of such commerce, including that conducted by merchants and trading companies no less than what is done by common carriers. *International Paper Co.* v. *Massachusetts* 135

7. License fee or excise of a given per cent. of par value of entire capital stock of foreign corporation doing both local and interstate business and owning property in several States, is a tax on entire business and property of corporation, and void as an illegal burdening of interstate commerce; *aliter* where tax properly restricted. *International Paper Co.* v. *Massachusetts* 135
Locomobile Co. v. *Massachusetts* 146
Cheney Bros. Co. v. *Massachusetts* 147

8. License tax, under law of Virginia taxing merchants doing business in State on basis of amount of purchases, but excluding manufacturers taxed on capital by State who offer their product for sale at place of manufacture, *held*, as applied to foreign corporation and as computed on basis of merchandise manufactured by it in other States and shipped into Virginia for sale at its agencies there, not to constitute an unconstitutional burden on interstate commerce. *Armour & Co.* v. *Virginia* 1

9. Where material part of business conducted in State by foreign corporation is intrastate, company is subject to licensing power of State. *Dalton Adding Machine Co.* v. *Virginia* 498
General Railway Signal Co. v. *Virginia* 500

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10. State tax on company owning freight cars, employed by railroads in hauling both interstate and intrastate commerce, *held* property tax and not one on gross earnings burdening interstate commerce. *Cudahy Packing Co.* v. *Minnesota* ... 450

IV. **Contract Clause.**

1. State statute authorizing city to determine without hearing the necessity and extent of an appropriation of private property for its public purposes, *held* not to violate Art. I, § 10. *Sears* v. *City of Akron* 242

2. Mere incorporation and organization under general laws of Ohio, with power to construct and operate hydro-electric power system at places designated, and to take water rights and riparian property for that purpose, does not imply contract between State and company that supply of water available shall not be diminished; and subsequent appropriation of water by city under state authority *held* not to impair obligation of contract. *Id.*

3. City may be enjoined from interference with franchise rights of telephone company. *Mitchell* v. *Dak. Cent. Tel. Co.* 396

V. **Indians.**

Congress can impose restrictions on alienation by Indians of allotted land after restrictions first imposed have expired. *Brader* v. *James* 88

VI. **Privileges and Immunities under Art. IV.**

License tax under law of Virginia taxing merchants doing business in State on basis of amount of purchases, but excluding manufacturers taxed on capital by State, who offer their product for sale at place of manufacture, *held*, as applied to a foreign corporation and as computed on the basis of merchandise manufactured by it in other States and shipped into Virginia for sale at its agencies there, not to abridge the privileges and immunities of the corporation guaranteed by Art. IV. *Armour & Co.* v. *Virginia* 1

VII. **Fourteenth Amendment.**

(1) *Notice and Hearing.*

1. State statute authorizing city to determine without hearing necessity and extent of appropriation of private prop-

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erty for public purposes, *held* not to violate Fourteenth Amendment. *Sears* v. *City of Akron* 242

2. As a criminal law Idaho sheep and cattle segregation law is not wanting in due process in failing to provide for ascertainment of boundaries of a "range" and for determining what length of time necessary to constitute a prior occupation a "usual" one within its meaning. *Omaechevarria* v. *Idaho* 343

3. State statute providing that judgment for damages recovered by wife against one selling intoxicating liquors to husband shall be lien upon premises where liquor sold does not violate due process clause as against owner who leased, or knowingly permitted the use of, such premises for sale of intoxicating liquor. *Eiger* v. *Garrity* 97

4. Such statute has effect of making tenant agent of landlord for its purposes; and latter not denied due process by taking judgment against tenant as conclusive upon amount of damages suffered and right to recover them, if, in proceedings to enforce lien, landlord allowed due opportunity to contravene rendition of such judgment and making of lease authorizing sale of intoxicating liquors, or his knowledge of such use of premises. *Id.*

(2) *Liberty of Contract.*

5. Law of State, governing life insurance contract made locally between resident citizen and locally licensed foreign corporation, and prescribing how net value of policy shall be applied to avoid forfeiture if premium not paid, cannot be extended to prevent policyholder, while present in such State, and company, from making and carrying out subsequent, independent agreement in company's home State, pursuant to its laws, whereby policy is pledged as security for loan and afterwards canceled in satisfaction of indebtedness. Such attempt is invasion of citizen's liberty of contract. *New York Life Ins. Co.* v. *Dodge* 357

(3) *Privileges and Immunities of Citizens.*

6. Exclusion of sheep owners, under circumstances, from use of the public domain, provided for in Idaho sheep and cattle segregation law, does not interfere with any right of a citizen of the United States. *Omaechevarria* v. *Idaho* 343

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7. Virginia license tax on merchants *held* not to violate this clause. *Armour & Co.* v. *Virginia* 1

(4) *Taking Private Property.*

8. Right of appropriation of water, with power of condemnation, acquired by company organized under general laws of Ohio, under which no property had been acquired, *held* subject to State's reserved power, and that an appropriation of water by city, under authority of state legislature, was not unconstitutional taking of company's property. *Sears* v. *City of Akron* 242

(5) *Taxation.* See **Taxation.**

9. License fee or excise of a given per cent. of par value of entire capital stock of foreign corporation doing both local and interstate business and owning property in several States, is a tax on entire business and property of corporation, and is void as a deprivation of property without due process of law; *aliter* if properly limited as to amount. *International Paper Co.* v. *Massachusetts* 135
Locomobile Co. v. *Massachusetts* 146
Cheney Bros. Co. v. *Massachusetts* 147

(6) *Regulation of Rates and Public Service.*

10. Ordinance fixing water rates from which net annual return is 4.3% of value of plant, excluding certain disputed water rights, in city where prevailing rate of interest for secured loans was 6%, *held* to amount to taking of company's property without due process of law. *Denver* v. *Denver Union Water Co.* 178

11. Railroad may be compelled to construct sidewalk over right of way. *Great Northern Ry.* v. *Clara City* 434

(7) *Equal Protection of the Laws.*

12. License tax under law of Virginia taxing merchants doing business in State on basis of amount of purchases, but excluding from its operation manufacturers taxed on capital by State, who offer their product for sale at place of manufacture, *held*, as applied to a foreign corporation and as computed on the basis of merchandise manufactured by it in other States and shipped into Virginia for sale at its

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agencies there, not to offend equal protection clause. *Armour & Co.* v. *Virginia*..... 1.

13. Where foreign corporation acquired real property and specially improved it at large cost, but still property was such that investment might be retrieved if need be, subsequent increase in its excise without corresponding change in tax bearing on domestic corporations does not deny equal protection of laws. *Cheney Brothers Co.* v. *Massachusetts*..... 147

14. Railroad may be required to construct sidewalk over right of way. *Great Northern Ry.* v. *Clara City*..... 434

15. Idaho sheep and cattle segregation law *held* not to discriminate arbitrarily and deny equal protection in giving preference to cattle owners in prior occupancy without giving like preference to sheep owners. *Omaechevarria* v. *Idaho*..... 343

VIII. **Who May Question Constitutionality of Statutes.**

Corporation organized under general laws expressly declaring that charters thereunder should be subject to provisions and limitations imposed by law cannot complain of unconstitutionality thereof as applied to others not so assenting. *International & G. N. Ry.* v. *Anderson Co*..... 424

CONSTRUCTION. See **Constitutional Law; Contracts; Indians; Interstate Commerce Acts; Public Lands; Statutes; Taxation.**

CONTRACTS. See **Anti-Trust Act**, 1, 2; **Insurance.**

Contracts between States and power of Congress over. See **Constitutional Law**, II.

Impairment of obligation. See **Constitutional Law**, IV.

Liberty of contract. See **Constitutional Law**, VII, (2).

Validity of stipulation in Uniform Live Stock Contract. See **Interstate Commerce Acts**, II, 1, 2.

Liability under warranty of seaworthiness contained in charter party. See **Admiralty.**

Street railway franchises. See **Franchises.**

Annulment by Assistant Postmaster General. See **Actions and Defenses**, 1.

CONTRACTS—*Continued.* PAGE

1. Mere incorporation and organization under general laws of Ohio, with power to construct and operate hydro-electric power system at places designated, and to take water rights and riparian property for that purpose, does not imply contract between State and company that supply of water available shall not be diminished; and subsequent appropriation of water by city under state authority *held* not to impair obligation of contract. *Sears* v. *City of Akron* 242

2. Even if such contract could be implied, act of legislature expressly authorizing such appropriation would be but an exercise of State's power to amend company's charter under state constitution. *Id.*

3. Where contract for manufacture of guns for United States provided for preliminary test subject to decision of Chief of Ordance and Secretary of War, those officials were to decide, not arbitrarily, but candidly and reasonably, whether test had been satisfied; findings of fact and report of Chief of Ordnance justify conclusion that test gun did not meet contract requirements; no ground for charge that in annulling contract officials acted in bad faith or under gross mistake, or for holding that Government by delays injurious to contractors waived right to annul. *Saalfield* v. *United States* 610

4. Where clearly indispensable to prosecution of a public work that contractor supply board to laborers, and board was so supplied, exclusively in the work, the price being deducted monthly from wages, *held*, that groceries and provisions furnished contractor and so consumed by laborers were "materials" within meaning of the Acts of 1894, 1905, and bond given thereunder. *Brogan* v. *National Surety Co.*. 257

5. Where contractor runs boarding house as independent enterprise, for profit, case is outside the statute. *Id.*

6. Neither Act of 1894, nor amendatory Act of 1905, is limited in application to labor and materials directly incorporated into public work. *Id.*

7. Act of 1894, and bonds given under it, must be construed liberally for protection of those who furnish labor or materials in prosecution of public work. *Id.*

CONTRACTS—*Continued.* PAGE

8. Guardian's contract to convey minor's interest in Indian allotment is subject to approval by United States court. *Talley* v. *Burgess* 104

CONTRIBUTORY NEGLIGENCE. See **Employers' Liability Act.**

CONTROVERSIES BETWEEN STATES. See **Boundaries; Constitutional Law,** II; **Jurisdiction,** III, (1).

CONVEYANCES. See **Indians.**

CORPORATIONS.

Residence within meaning of § 7 of Sherman Act. See **Anti-Trust Act,** 4.

Service of process upon. See **Jurisdiction,** II.

License taxes. See **Taxation.**

Foreign, taxation of. See **Taxation.**

Reserved power of States over. See **Constitutional Law,** VII, (4).

Regulation of rates and public service. See **Carriers; Constitutional Law,** VII (6); **Interstate Commerce Acts; Railroads.**

Interstate carrier's liability for personal injuries. See **Employers' Liability Acts.**

COURT OF CLAIMS. See **Jurisdiction,** V.

COURTS. See **Equity; Jurisdiction; Mandamus; Procedure.**

CREEK INDIANS.

Oil and gas leases of restricted lands. See **Indians,** 9–12.

CRIMINAL LAW.

1. Statutes creating and defining crimes not to be extended by intendment upon ground that they should have been made more comprehensive. *United States* v. *Weitzel* 533

2. In the construction of statutes defining crimes there can be no constructive offenses, and to warrant punishment case must be plainly and unmistakably within statute. *United States* v. *Bathgate* 220

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3. Section 5209, Rev. Stats., punishing embezzlement, etc., does not apply to receiver of national bank appointed by Comptroller of Currency under § 5234. *United States* v. *Weitzel* 533

4. Crim. Code, § 19 (Rev. Stats., § 5508) does not include conspiracy to bribe voters at general election within State where presidential electors, United States Senator and representative in Congress are to be chosen. The section aims to guard definite personal rights or privileges, capable of enforcement by a court, such as right to vote for federal candidates, but not the political non-judicable right or privilege, common to all, that public shall be protected against harmful acts, to which latter appertain the general interests of candidate and voter in the fair and honest conduct of such elections. *United States* v. *Bathgate* 220

5. As a criminal law Idaho sheep and cattle segregation law is not wanting in due process in failing to provide for ascertainment of boundaries of a "range" and for determining what length of time necessary to constitute a prior occupation a "usual" one within its meaning. *Omaechevarria* v. *Idaho* 343

CUSTOMS LAW.

1. Only grounds recognized by Act of 1897, as amended, for excluding tea from import, are inferiority to standard in purity, quality and fitness for consumption; where tea offered is otherwise superior to standard in value and purity, fact that it contains a minute and innocuous quantity of coloring matter not found in sample will not justify shutting it out, notwithstanding regulation of Secretary of Treasury, purporting to be based on the statute, declares presence of any coloring matter an absolute ground for exclusion. *Waite* v. *Macy* 606

2. In absence of other adequate remedy for importer, the Tea Board constituted under Act of 1897 may be enjoined from excluding tea upon a test prescribed by Secretary of Treasury but not sanctioned by the statute. *Id.*

DAMAGES. See **Employers' Liability Act**, 10–13; **Patents for Inventions**, 2; **Public Lands**, V, 2.

DAMAGES UNDER RULE 23. See **Procedure, III, 2.** PAGE

DEATH.

Effect to suspend proceeding until substitution of party. See **Parties, 3, 4.**

DECEIT. See **Public Lands, V, 1.**

DECREES. See **Judgments.**

DEEDS. See **Indians.**

DISTRICT COURTS. See **Jurisdiction.**

DISTRICT OF COLUMBIA. See **Jurisdiction, V, 3, 4; VII.**

1. Judgments of Court of Claims on claims against District not to include interest, except when satisfied in special manner provided by § 6 of Act of 1880. *Sheckels* v. *District of Columbia*. 338

2. Supreme Court of may, by mandamus, direct Interstate Commerce Commission to entertain and proceed to adjudicate cause which it has erroneously declared not to be within its jurisdiction. *Louisville Cement Co.* v. *Interstate Com. Comm.* 638

DIVERSITY OF CITIZENSHIP. See **Jurisdiction, IV.**

DRAM SHOPS.

Illinois law sustained. See *Eiger* v. *Garrity* 97

DUE PROCESS OF LAW. See **Constitutional Law, VII.**

ELECTIONS:

1. It has been the policy of Congress not to interfere with elections within a State except by clear and specific provisions. *United States* v. *Bathgate* 220

2. Crim. Code, § 19 (Rev. Stats., § 5508) does not include conspiracy to bribe voters at general election within State where presidential electors, United States Senator and representative in Congress are to be chosen. The section aims to guard definite personal rights or privileges, capable of enforcement by a court, such as right to vote for federal

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candidates, but not political non-judicable right or privilege, common to all, that public shall be protected against harmful acts, to which latter appertain the general interests of candidate and voter in the fair and honest conduct of such elections. *Id.*

EMBEZZLEMENT. See **Criminal Law**, 3.

EMINENT DOMAIN. See **Constitutional Law**, VII (4).
State statute authorizing city to determine without hearing the necessity and extent of appropriation of private property for its public purposes, *held* not to violate Art. I, § 10, or Fourteenth Amendment. *Sears* v. *City of Akron* 242

Right of action of riparian owner where no direct taking under power of eminent domain. See **Actions and Defenses**, 4.

EMPLOYERS' LIABILITY ACT. See **Jurisdiction**, III, 13–17; IV, 1–3.

1. *Liability under.* Civil engineer, employed by railroad, while surveying within one of its yards, was injured by fall resulting from defective tie and a space between ties unfilled by ballast. *Held*, upon the evidence, that company did not fail in any duty which it owed to him. *Nelson* v. *Southern Ry.* 253

2. *Conflict of Laws.* There is no inconsistency between act and the application to a case arising under it in state court of a general state law giving attorney a lien on client's cause of action and rendering defendant directly liable to attorney. *Dickinson* v. *Stiles* 631

3. *Id.* Where this question called to attention of state trial and supreme courts and discussed by latter, upon intervention by attorney in action wherein complaint stated case under the act, this court has jurisdiction by writ of error to review judgment sustaining lien. *Id.*

4. *Boiler Inspection Act.* Is a "statute enacted for the safety of employees" within meaning of § 4 of Liability Act. *Great Northern Ry.* v. *Donaldson* 121

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5. *Id.* When feature of construction renders a boiler unsafe, within the definition of § 2, the fact that it has not been disapproved by federal inspector does not absolve carrier from liability. *Id.*

6. *Id.* Where, in action to recover damages for death resulting from injuries received by reason of boiler explosion upon engine upon which decedent was employed, there was evidence tending to prove that boiler was unsafe, request for instruction stating that no safety statute was applicable, and submitting question of assumption of risk, *held* inconsistent with § 4 of Employers' Liability Act and § 2 of Boiler Inspection Act. *Id.*

7. *Id. Assumption of Risk.* Instruction to effect that if jury believed from a fair preponderance of evidence that boiler was not in proper condition, etc., defined by Boiler Act, due to defendant's negligence, there would be no assumption of risk, but if employee had actual knowledge of such defects or they were so plainly visible that in reasonable exercise of his faculties he should, and might be presumed to, have known them, then he assumed the risk, *held* more favorable to defendant than law required *Id.*

8. *Proximate Cause.* That brakeman, who was killed by a rear-end collision while in caboose of standing train, would have escaped if he had been at his post to give warning, as his duty required, does not make his neglect the only proximate cause of his death, if collision due also to negligent operation of train coming from behind. *Union Pacific R. R.* v. *Hadley* 330

9. *Negligence.* If defendant's conduct, viewed as a whole, warrants finding of negligence, trial court may properly refuse to charge concerning each constituent item mentioned by declaration, and leave question to jury. *Id.*

10. *Damages.* In action on behalf of widow of deceased employee, instruction that measure of damages should be such as would fairly and reasonably compensate her for loss of pecuniary benefits she might reasonably have received but for husband's death, *held* correct, as a general instruction, leaving defendant right to have it supplemented by another indicating that future benefits must be considered at their present value. *Louisville & Nashville R. R.* v. *Holloway*. 525

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11. *Id.* Defendant not entitled to instruction that, as matter of law, value of money to beneficiary should be measured by legal rate of interest, or that duration of future benefits could not have exceeded life expectancy of deceased as given by actuarial table. *Id.*

12. *Id.* Where evidence such as to justify jury in treating employee's contributory negligence as slight, or inconsequential in its effects, jury may properly find that nothing substantial should be deducted on account of it from damages; and fact that verdict is excessive will not warrant assumption of disobedience of court's instructions on apportionment. *Union Pacific R. R.* v. *Hadley*..... 330

13. *Id.* Where state courts cut down excessive verdict upon assumption that excess was due to jury's failure to follow instructions on diminution of damages for contributory negligence, *held*, assumption not being justified by record, that their action did not invade province of jury, but was merely in exercise of power to require remittitur. *Id.*

ENCLOSURES. See **Public Lands, I.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** VII (7).

EQUITY.

1. *Fraud. Insolvency. Sufficiency of Allegations.* General allegations of fraud and insolvency *held* not to supply the absence of facts entitling plaintiff to equitable relief. *Sears* v. *City of Akron*..... 242

2. *Injunction; to Restrain Administrative Board.* Transgression of its statutory power by administrative board is subject to judicial restraint, although guised as a discretionary decision within its jurisdiction. *Waite* v. *Macy*.. 606

3. *Id.* In testing right of injunction against administrative officers, presumption that they will follow law, though set up in their answer, cannot be indulged where intention to obey illegal regulation of their superior is not directly disclaimed by them and is admitted by their counsel. *Id.*

4. *Id.* In absence of other adequate remedy for importer, the Tea Board constituted under Act of 1897 may be en-

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joined from excluding tea upon a test prescribed by Secretary of Treasury but not sanctioned by the statute. *Id.*
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5. *Id. Interstate Commerce Commission.* In suit to enjoin enforcement of order of Interstate Commerce Commission fixing rates, evidence *held* insufficient to establish that rate confiscatory. *Manufacturers Ry. Co.* v. *United States*. 457

6. *Id. Decree.* Decree of injunction which properly will be operative until law is changed may properly be expressed as perpetual. *International & G. N. Ry.* v. *Anderson Co.* 424

7. *Suit to Annul Will.* Texas county court has no equitable jurisdiction of suit *inter partes* to annul dispositions in will and partition property among plaintiffs as heirs, where title to land is involved and amount in controversy exceeds $1,000. *Sutton* v. *English* 199

Availability of injunction to restrain infringement of patent. See **Patents for Inventions**, 3.

EROSION AND ACCRETION.
Effect upon boundary consisting of running stream. See **Boundaries.**

EVIDENCE. See **Interstate Commerce Acts; Judicial Notice; Presumptions.**
Burden of proof. See **Public Lands**, V, 3.
Where state courts have found sufficient evidence to sustain verdict for plaintiff in action under Employers' Liability Act this court will go no farther than to ascertain that there is evidence supporting the verdict. *Great Northern Ry.* v. *Donaldson* 121

EXCISE TAXES. See **Taxation.**

EXECUTIVE OFFICERS. See **Customs Law; Equity**, 2–5; **Indians** 2–4, 7, 9–12, 15; **Jurisdiction**, I, 5.

EXTRADITION.
Where person held for interstate rendition obtained *habeas corpus* on ground that he was not a fugitive from justice, *held*, that contention did not draw in question validity of authority exercised under arresting State by its governor in

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issuing his warrant and in holding petitioner for removal, but merely correctness of the exercise, and that judgment of the state court holding, on indictment and evidence, that petitioner was a fugitive, and dismissing *habeas corpus* was not reviewable by writ of error under Jud. Code, § 237. *Ireland* v. *Woods*..... 323

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FINDINGS OF FACT. See **Interstate Commerce Acts; Procedure.**

FOOD AND DRUGS ACT.
1. A bottled article labeled "Compound Ess Grape" but containing nothing from grapes, is adulterated within meaning of §§ 7–8; and also misbranded. *United States* v. *Schider*..... 519

2. In such case mere use of word "compound" is not a compliance with proviso in par. 4 of § 8. *Id.*

FORECLOSURE. See **Railroads,** 2–6.

FOREIGN CORPORATIONS:
Power of State to tax. See **Taxation,** II.
Service of process upon. See **Jurisdiction,** II.

FOREIGN RELATIONS. See **Constitutional Law,** I; **International Law.**

FOURTEENTH AMENDMENT. See **Constitutional Law,** VII.

FRANCHISES.
1. Grants of rights or privileges by State or its municipalities are strictly construed; what is not unequivocally granted is withheld; nothing passes by mere implication. *City of Mitchell* v. *Dakota Tel. Co*..... 396

2. A grant of all right and authority that city "has capacity to grant," without a hint of limitation as to time, is a grant in perpetuity if city has right to grant perpetually. *Covington* v. *South Covington St. Ry. Co*..... 413

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3. An ordinance entitled "prescribing the terms and conditions of street passenger railroads," providing for specific routes and declaring that "all contracts made under the provisions of this ordinance shall be for the term and period of twenty-five years," *held* not to be addressed to scope of future ordinances, and not to limit term, otherwise perpetual, of franchise for other routes granted by a later ordinance. *Id.*

4. One street railroad company held perpetual ordinance franchise, and another a limited one with but eight years to run with right to secure new franchise or compensation for property. An ordinance, entitled as granting right of way to first company over streets held by second, authorized first to contract for second's right and to "occupy and use" such streets, "subject to the conditions, limitations and restrictions" contained in ordinances regulating first company's rights in streets it already occupied, but, as condition, obliged first company to give up part of its line which would be but imperfectly supplied by the new rights even if they were perpetual. *Held*, that ordinance granted a perpetual franchise to first company, and was not merely consent that it acquire right of second. *Id.*

5. Where not otherwise construed by state court, legislation vesting streets in city and giving its authorities exclusive control over them and its council exclusive power to establish and regulate all sidewalks, streets, etc., is to be taken as empowering city to grant street railroad franchises in perpetuity. *Id.*

6. Provisions of ordinance fixing rates which water company, whose franchise had expired, might charge in future, providing for collection of charges in advance, and requiring installation of meters and hydrants, and imposing fines for violation of ordinance, *held* to confer, impliedly, privileges necessary to enable company to continue service, and so, as granting new franchise of indefinite duration, terminable by either city or company at such time and under such circumstances as would be consistent with duty owed to inhabitants. *Denver* v. *Denver Union Water Co.* 178

7. After granting nonexclusive right to use streets, etc., under which local telephone system was established, city passed ordinance granting privilege of operating "long

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distance telephone lines" "within and through" city for supplying facilities to communicate "by long distance telephone" or other electrical devices, with parties residing "near or at a distance from" the city, and then another changing the word "lines" to "system," and expressing proposed communication as with parties residing "*in*, near or at a distance from" the city. *Held* an unjustifiable implication to construe last ordinance as granting new term for local exchange system. *City of Mitchell* v. *Dakota Tel. Co.* 396

FRAUD. See **Equity**, 1; **Public Lands**, I, 4.

FUGITIVE FROM JUSTICE. See **Extradition.**

GOVERNMENT CONTRACTS. See **Contracts**, 3–7.

GRAZING LAWS. See **Constitutional Law**, VII, 2, 6, 15; **Public Lands**, III.

HABEAS CORPUS:

1. Where person held for interstate rendition obtained *habeas corpus* on ground that he was not a fugitive from justice, *held*, that contention did not draw in question validity of authority exercised under the arresting State by its governor in issuing his warrant and in holding petitioner for removal, but merely correctness of the exercise, and that judgment of state court holding, on indictment and evidence, that petitioner was a fugitive, and dismissing *habeas corpus*, was not reviewable by writ of error under Jud. Code, § 237. *Ireland* v. *Woods* 323

2. Limitations on right to review by this court apply in *habeas corpus* cases as in others sought to be reviewed under Jud. Code, § 237. *Id.*

HAGUE CONVENTIONS. See **International Law**, 7.

HEIRS:

Right of heirs of Indian allottees. See **Indians**, 2–7.

HOMESTEADS. See **Indians**, 7, 8; **Public Lands**, I.

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Sheep and cattle segregation law is not unreasonable or arbitrary exercise of police power; does not deny due process and equal protection of laws; and is not in conflict with § 1 of act to prevent unlawful occupancy of the public lands. *Omaechevarria* v. *Idaho* 343

ILLINOIS:

Dram Shop Act upheld. *Eiger* v. *Garrity* 97

IMPAIRMENT OF CONTRACT OBLIGATION. See **Constitutional Law**, IV, VIII.

INDIAN COUNTRY. See **Indians**, 13.

INDIANS. See **Public Lands**, IV, 2, 3.

1. *Allotments. Restrictions on alienation. Power of Congress.* No doubt exists of constitutional authority of Congress to reimpose restrictions on alienation as by the Act of April 26, 1906. *Brader* v. *James* 88

2. *Allotments. Right of heirs; Conveyances.* Under § 7, Act of 1902, an Indian allotment held under trust patent and subject to restrictions on alienation imposed by Act of 1889, may, upon death of allottee, be conveyed by his heirs with approval of Secretary of Interior, and approved deed passes full title. *Egan* v. *McDonald* 227

3. *Id.* Where such conveyance was made in 1908, and Secretary approved it in 1909, *held*, that there was no law then in force making an adjudication of heirship a condition precedent to validity of conveyance. *Id.*

4. *Id.* Whether mere approval by Secretary would operate to convey a good title if it had appeared that deed was executed by a part of heirs only, not decided. *Id.*

5. *Allotments. Alienation by heir.* Cherokee Agreement of 1902 imposed no restriction, other than that of minority, upon alienation by heir of his interest in land allotted under § 20 in name of ancestor who died before receiving allotment. *Talley* v. *Burgess* 104

6. *Id.* Act of 1906 applied to allotments made before its date under § 20 of Cherokee Agreement, and required that a guardian's contract, made on May 11, 1906, to con-

INDIANS—*Continued.* PAGE

vey minor's interest be approved by United States court as condition to validity. *Id.*

7. *Id. Homesteads. Restrictions on alienation.* Under Supplemental Agreement of 1902, homestead allotment of full-blood Choctaw became free from restrictions imposed by § 12 at death of allottee, and heir, though a full-blood, might alienate without approval by Secretary of Interior; but by virtue of Act of 1906 the right in such case was again restricted so that such approval became necessary. *Brader* v. *James* 88

8. *Id.* In determining effect of Act of 1906 upon right of full-blood Indian to alienate, no distinction made between cases in which restrictions, previously imposed, were existent at date of act and those in which they had expired. *Id.*

9. *Oil and gas leases.* Oil and gas lease of restricted land of Creek full-blood not valid without approval of Secretary of Interior. *Anicker* v. *Gunsburg* 110

10. *Id.* When two such leases, one of which approved, unsuccessful claimant to charge adversary as trustee must show that, as matter of law, Secretary erred both in approving the one lease and in refusing to approve other. *Id.*

11. *Id.* That plaintiff's lease was first filed with agency, and that it was recorded with county register of deeds, whereas defendant's was not; and any constructive notice coming therefrom; and effect of rule of Secretary of Interior providing for filing within thirty days of execution, are matters beside the case where it does not appear affirmatively that Secretary would have approved plaintiff's lease had he refused to approve defendant's. *Id.*

12. *Id.* Approval of such leases rests in exercise of discretion by Secretary; and action within his discretionary power is not vitiated by fact that reasons assigned were not wholly sound. *Id.*

13. *Indian country; effect of railroad grant.* Grant made by Act of 1889 to Big Horn Southern R. R. of right of way through Crow Reservation, whether amounting to mere easement, limited fee, or other limited interest, *held* not entitled to extinguish title of Indians in land comprised

INDIANS—*Continued.* PAGE

in such right of way, which therefore remains "Indian country" within meaning of Liquor Act of 1897. *United States* v. *Soldana* 530

14. *Trust funds.* Section 5 of Act of 1912 (37 Stat. 86), and regulations issued thereunder, contemplate supervision of expenditure of trust funds, but not control of property for which money was expended. *McCurdy* v. *United States* 263

15. *Id. State taxation of lands.* Acts of 1906 and 1912, respecting Osage Indians, do not authorize Secretary of Interior to impose restrictions upon private land purchased for nno-competent allottee with his trust money previously released, and thus exempt it as a governmental instrumentality from state taxation. *Id.*

16. *Appropriation for civilization and self-support.* Congress, in acts making appropriations under general head for "current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes," having long made a practice of appropriating each year specifically for "civilization and self-support" of Chippewa Indians in Minnesota out of their trust funds under the Act of 1889, *held*, that the appropriation so expressed in the appropriation act for fiscal year 1915 was repeated for fiscal year 1916 by Joint Resolution of March 4, 1915. *Lane* v. *Morrison* 214

17. *Wills; federal jurisdiction.* Where probate of will of full-blood Creek Indian refused solely on ground of mental incapacity, questions sought to be raised under acts of Congress *held* immaterial for purposes of jurisdiction of this court. *Bilby* v. *Stewart* 255

INFANTS. See **Indians**, 6; **Parent and Child.**

INFRINGEMENT. See **Patents for Inventions.**

INJUNCTION. See **Equity**, 2–5; **Patents for Inventions**, 3.

INSOLVENCY. See **Bankruptcy**; **Equity**, 1.

INSTRUCTIONS TO JURY. See **Employers' Liability Act**, 6, 7, 9–13.

INSURANCE: PAGE

1. A law of a State, governing life insurance contract made locally between resident citizen and locally licensed foreign corporation, and prescribing how net value of policy shall be applied to avoid forfeiture if premium not paid, cannot be extended to prevent policyholder, while present in such State, and company from making and carrying out subsequent, independent agreement in company's home State, pursuant to its laws, whereby policy is pledged as security for a loan and afterwards canceled in satisfaction of the indebtedness. *New York Life Ins. Co.* v. *Dodge* 357

2. A life insurance policy, issued in Missouri to a resident and citizen of that State by New York corporation with Missouri license, provided that insured might obtain cash loans on security of policy on application at company's home office, subject to terms of its loan agreement, and that any indebtedness to company should be deducted in any settlement of policy or of any benefit thereunder. *Held*, that this imposed no obligation on company to make a loan subject to a Missouri nonforfeiture law governing policy and devoting three-fourths of its net value to satisfaction of premium indebtedness exclusively and extension of the insurance, in case of default. *Id.*

3. A loan agreement with insurer, a New York corporation, with pledge of policy as security, signed by insured and beneficiary, resident citizens of Missouri, *held* a valid New York contract and that foreclosure of the pledge under the laws of that State and the extinguishment of the reserve of the policy to satisfy the loan was defense to action on policy in courts of Missouri, notwithstanding a Missouri nonforfeiture statute was construed as continuing the insurance in force. *Id.*

INTEREST:

As to when judgment of Court of Claims on claim against District of Columbia may include and bear interest. See *Sheckels* v. *District of Columbia* 338

INTERNATIONAL LAW. See **Constitutional Law**, I.

1. Every sovereign state is bound to respect independence of every other sovereign state and the courts of one country will not sit in judgment on acts of government of another done within its own territory. Redress of grievances by

INTERNATIONAL LAW—*Continued.* PAGE

reason of such acts must be through means open to be availed of by sovereign powers as between themselves. *Oetjen* v. *Central Leather Co.* 297
Ricaud v. *American Metal Co.* 304

2. Who is sovereign *de jure* or *de facto* of a foreign territory is a political question, determination of which by the political departments of government conclusively binds the judges. *Oetjen* v. *Central Leather Co.* 297

3. When a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all actions and conduct of government so recognized from commencement of its existence. *Id.*

4. Court notices judicially that United States recognized Government of Carranza as *de facto* government of Mexico on Oct. 19, 1915, and as *de jure* government on Aug. 31, 1917. *Id.*

5. The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving title to property brought within the custody of a court as to claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. *Id.* *Ricaud* v. *American Metal Co.* 304

6. Fact that property seized and sold by authorities of a foreign government belonged to American citizen, not residing in the foreign country at the time, does not empower court of this country to reëxamine and modify their action. *Ricaud* v. *American Metal Co.* 304

7. *Semble*, that Hague Conventions do not apply to a civil war, and that regulations annexed to Convention of 1907 do not forbid such military seizure and sale of private property as is involved in this case. *Oetjen* v. *Central Leather Co.* 297

INTERSTATE COMMERCE. See **Interstate Commerce Acts; Taxation**, II; III.
As to what constitutes unconstitutional burdens on, see **Constitutional Law**, III.

INTERSTATE COMMERCE ACTS: PAGE

I. Powers and Proceedings of Commission.

1. *Effect of findings.* A finding that railway is a common carrier does not mean that all of its property must be treated as employed in public service; portions used as private plant facility should not be considered in determining adequacy of a rate. *Manufacturers Ry. Co.* v. *United States* 457

2. *Id. Judicial interference.* Whether discrimination is undue, unreasonable or unjust is question of fact confided to judgment and discretion of Commission, and upon which its decisions, made basis of administrative orders operating *in futuro*, are not to be disturbed by courts except upon showing that they are unsupported by evidence, were made without hearing, exceed constitutional limits, or for some other reason amount to abuse of power. *Id.*

See 6, *infra.*

3. *Rate fixing; considerations.* In testing adequacy of interstate rates, it is error to base computation on receipts and expenses of carrier's entire business without considering adequacy of its charge for services not affected by the rate or their possibly private character. *Id.*

4. *Rate fixing; burden of proof of reasonableness.* The "increased rate clause" does not lay upon carrier burden of proving a new rate reasonable when that question is not involved in a hearing before Commission. *Id.*

5. *Joint rates; review by Commission.* In fixing joint rates it is within discretion of Commission to allow carriers to arrange divisions, as contemplated by first paragraph of § 15, subject to review by Commission. *Id.*

See 12, *infra.*

6. *Through routes and joint rates. Effect of findings.* In a proceeding to establish through routes and joint rates over a company operating terminals and held by Commission to be a common carrier, and certain trunk lines, *held*, that finding of Commission, based upon differences of location, ownership and operation, that there was no undue discrimination was not without evidentiary support and not an abuse of discretion; that Commission was justified in holding that not more than a specified amount per car should be

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

added to trunk line rates for terminal; that in fixing maximum joint rate Commission properly assumed trunk line rates to be reasonable *per se;* and that complainants were entitled at most to have Commission consider nature and objects of St. Louis Terminal Association, in favor of which trunk lines were charged with unlawful discrimination, as circumstances bearing upon question of discrimination and questions pertinent thereto. *Id.*

7. *Suspensions of new rates.* Pending a proceeding involving inquiry as to how much could be allowed a terminal as divisions or absorptions by trunk line carriers, one of which, being a party, filed and published a tariff providing for absorptions of terminal's switching charges up to a certain rate per car which it had previously allowed and retracted and was in the position of attacking in the proceeding as illegal and excessive, a suspension by Commission of proposed absorption, for 120 days from effective date, and then for six months, to await its decision in pending inquiry, treating the one as ancillary to the other and as involving no different question on the merits, and, upon deciding the original matter within the 6 months, canceled the tariff without having given it a separate hearing, *held* proper and not inconsistent with provisions of § 15, par. 2, as amended. *Id.*

8. *Stoppage of trains; conflict of orders; power of state commission.* Power in state commission to order stop by interstate trains, not resulting in direct burden on interstate commerce, in pursuance of statute not aimed at such trains but specifying train service required at county seats, may coexist with the duty imposed on carriers respecting regulations for transportation facilities by Hepburn Act and Act of June 18, 1910, and jurisdiction of Interstate Commerce Commission over such matters, if order not in conflict with regulations of latter commission. *Gulf, Colorado &c. Ry.* v. *Texas* 58

9. *Recovery of damages; time for filing complaint.* Provision of § 16 that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after" is not a mere statute of limitations but is jurisdictional. *Louisville Cement Co.* v. *Interstate Com. Comm.* 638

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

10. *Id.* The "cause of action accrues" to a shipper, within meaning of this provision, when the unreasonable charges are paid, not when the shipment is received or delivered by the carrier. *Id.*

11. *Id.* It having been definitely settled by prior decisions of this court that the time when a "cause of action accrues" is the time when suit may first be legally instituted upon it, it must be assumed that Congress, in using that expression without qualifying words, adopted the meaning thus attached to it. *Id.*

12. *Judicial interference; orders fixing joint rates.* District Court has no jurisdiction to exercise administrative authority when Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. So *held* where the Commission fixed maximum joint rates for trunk lines and a terminal company, and the gravamen of the latter's suit was the failure to fix the divisions. *Manufacturers Ry. Co.* v. *United States*..... 457

13. *Id. Constitutional validity of rate-fixing order.* Although a rate-fixing order is not conclusive against attack upon the constitutional ground of confiscation, correct practice requires that the objection be made, and all evidence pertinent thereto adduced, before the Commission in the first instance if practicable. *Id.*

14. *Id. Order setting aside rate.* Where the Commission, after full hearing, sets aside a rate as unreasonably high, only a clear case would justify a court, upon evidence newly adduced but not newly discovered, in annulling Commission's action on ground of confiscation. *Id.*

15. *Id. Order fixing rates.* In suit in District Court to enjoin enforcement of order of Commission fixing rates, evidence *held* insufficient to establish that rate confiscatory. *Id.*

16. *Id. Evidence of reasonableness.* The voluntary adoption of a rate by a carrier is some evidence against the carrier that it is remunerative. *Id.*

17. *Id. Evidence of adequacy of rate.* Where a city leased for railway purposes land which in considerable part consti-

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

tuted a public wharf, at a rental less than the fair annual value, presumption is that excess was granted to public and not to private interest of carrier, in capitalizing its assets for purpose of testing adequacy of rate. *Id.*

II. **Duties, Rights and Liabilities of Carriers and Shippers.**

1. *Limitation of liability. Uniform Live Stock Contract.* Stipulation in contract filed with Commission, limiting carrier's liability for unusual delay and detention caused by its own negligence to amount actually expended by shipper in purchase of food and water for stock while so detained, is illegal and not binding on shipper who executed contract and shipped for corresponding reduced tariff rate. *Boston & Maine R. R.* v. *Piper*..... 439

2. *Id.* Such stipulation contravenes principle that carrier may not exonerate itself from losses caused by own negligence, and is not within principle of limiting liability to an agreed valuation made basis of reduced rates. *Id.*

3. *Bill of lading; effect of filing.* Illegal conditions and limitations in bill of lading do not gain validity from filing of a form with Commission. *Id.*

4. *Terminal charges; equality of treatment.* Common use of facilities of St. Louis Terminal by fourteen trunk lines owning its capital stock, under a single arrangement by which they absorbed the terminal charges, *held* not as a matter of law to entitle another terminal company, having no trunk line and doing terminal switching alone, to precisely the same treatment. *Manufacturers Ry. Co.* v. *United States*..... 457

5. *Reparation.* Proper foundation for reparation *held* not laid in evidence in case. *Id.*

6. *Carmack Amendment, liability under.* An undertaking for proper care and service implied with company's contract to furnish cars to shipper cannot, in an action against a refrigerator car company for damages to goods in interstate transit, be a basis for liability under Carmack Amendment. *Emery & Co.* v. *American Refrigerator Co*..... 634

7. *Live stock transportation act; excusable delay.* The "28 Hour Law" must be construed with view to carrying out

INTERSTATE COMMERCE ACTS—*Continued.* PAGE

its humanitarian purpose, but the exception in favor of the carrier must be given proper latitude and enforced in light of practical railroad conditions. *Chicago & N. W. Ry.* v. *United States* 512

8. *Id.* If, after the exercise of diligence and foresight to prevent accidents and delays and to overcome effect of any which may happen, with an honest purpose to secure unloading within the lawful period, unloading is actually prevented by storm or accident, the reasonable delay must be excused. *Id.*

9. *Car company; liability as common carrier.* A charge that a car company, by furnishing improper cars and service, failed in duty to railroad and to public, and so caused damage to goods in interstate transit, if it did not make out company a common carrier, stated no duty under the act but only one at common law. *Emery & Co.* v. *American Refrigerator Co.* 634

10. *Id. Assumption of liability of railroad.* Liability of car company under a contract assuming liability of railroad (if shipper could avail of it) would not make action against former for damages to goods in interstate transit one arising under the act. *Id.*

INTERSTATE COMMERCE COMMISSION. See **Interstate Commerce Acts; Jurisdiction,** IV, (4).

INTERSTATE RENDITION. See **Extradition.**

INTOXICATING LIQUORS:

1. State statute providing that judgment for damages recovered by wife against one selling intoxicating liquors to husband, shall be a lien upon premises where liquor sold, does not violate due process clause as against owner who leased, or knowingly permitted the use of, such premises for the sale of intoxicating liquors. *Eiger* v. *Garrity* 97

2. Such statute has effect of making tenant agent of landlord for its purposes; and latter not denied due process by taking judgment against tenant as conclusive upon amount of damages suffered and right to recover them, if, in proceedings to enforce lien, landlord allowed due opportunity

INTOXICATING LIQUORS—*Continued.* PAGE
to controvert rendition of such judgment and making of lease authorizing sale of intoxicating liquors, or his knowledge of such use of premises. *Id.*

3. Illinois Dram Shop Act upheld. *Id.*

4. "Indian country" within meaning of Act of 1897. *United States* v. *Soldana* 530

JOINT RESOLUTIONS:
Effect of Joint Resolution continuing appropriations for former year contained in prior act. See *Lane* v. *Morrison* ... 214

JUDGES. See **Canal Zone.**

JUDGMENTS. See **Jurisdiction**, III; **Procedure**, III.
1. A judgment herctofore rendered in a suit between States cannot later be attacked upon the ground that in original cases in this court one State cannot recover from another in a mere action of debt. *Virginia* v. *West Virginia* 565

2. The authority to enforce its judgments is of the essence of judicial power and this elementary principle applies to original jurisdiction in controversies between States. *Id.*

3. Judgment of trial court modified to correct clerical error appearing by trial court's opinion and concession of counsel. *Ibanez* v. *Hongkong Banking Corp.* 627

4. In suit in District Court by telephone company against city, involving question whether plaintiff's right to operate its city exchange system was included with its right to operate long distance system under a later, existing ordinance contract, or was confined to earlier ordinance contract which has expired, judgment of state court in another case between same parties, treating the ordinances as independent, if not actually conclusive must be treated as of much weight. *City of Mitchell* v. *Dakota Tel. Co.* 396

5. Decree of injunction which properly will be operative until law is changed may properly be expressed as perpetual. *International & G. N. Ry.* v. *Anderson Co* 424

6. Claimant against District of Columbia, suing in Court of Claims under Act of 1880, not entitled to receive interest as such, save any that may accrue after rendition of judg-

JUDGMENTS—*Continued.* PAGE

ment, where recovery not based upon contract expressly stipulating for interest. *Sheckels* v. *District of Columbia* 338

7. Provision of § 6 of Act of 1880 for satisfying such judgments with bonds bearing coupons for interest from date upon which the claims were due and payable, amounted to giving interest, at a limited rate, before and after judgment, where payment made in that mode; but as to amount of claim allowed, not so satisfied, interest prior to judgment not allowable. *Id.*

8. In a suit by G to enjoin R from using trademark on "straight" whiskey, claimed by former through prior appropriation, a former decree, set up by R claiming to be acting as agent of H, dismissing bill in former suit brought by G against predecessors of H, to enjoin them from using the same mark on "blended" whiskey, *held* a bar, notwithstanding the later suit related to "straight" whiskey and notwithstanding subsequent registration of trademark by plaintiff for "straight" whiskey. *Rock Spring Co.* v. *Gaines & Co.* 312

9. Judgment for damages from sale of intoxicants a lien on premises where sold. *Eiger* v. *Garrity* 97

JUDICIAL NOTICE:

1. Court notices judicially that United States recognized the Government of Carranza as *de facto* government of Mexico on Oct. 19, 1915, and as *de jure* government on Aug. 31, 1917. *Oetjen* v. *Central Leather Co.* 297
Ricaud v. *American Metal Co.* 304

2. Facts supplied by judicial notice may enable court to answer questions from Court of Appeals, where otherwise insufficiency of certificate would necessitate its return. *Ricaud* v. *American Metal Co.* 304

JURISDICTION:

I. In General, p. 718.

II. Jurisdiction over the Person, p. 719.

III. Jurisdiction of this Court.

(1) Original, p. 720.

(2) Over District Courts, p. 721.

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IV. Jurisdiction of District Courts.

(1) Removal Proceedings, p. 724.
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(3) Under Contract Clause, p. 725.
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(5) Suits Arising Under Patent Laws, p. 726.
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V. Jurisdiction of Court of Claims, p. 726.

VI. Jurisdiction of State Courts, p. 726.

VII. Jurisdiction of Supreme Court of District of Columbia, p. 727.

For questions of Local Laws see III, (3); VI.

I. **In General.**

1. Propriety of exercise of political power is not subject to judicial inquiry or decision. *Oetjen* v. *Central Leather Co.*.... 297

2. The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. *Id.*

3. The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving title to property brought within the custody of a court as to claims for damages based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. *Oetjen* v. *Central Leather Co.*..... 297
Ricaud v. *American Metal Co.*.... 304

4. The fact that property seized and sold by authorities of a foreign government belonged to an American citizen, not residing in the foreign country at the time, does not empower court of this country to reëxamine and modify their action. *Ricaud* v. *American Metal Co.*..... 304

5. Courts may not interfere with the exercise by the Secretary of the Interior of discretionary power, but only to protect rights when they are invaded by clearly unauthorized action. *Anicker* v. *Gunsburg*..... 110

6. Courts must apply patent law as they find it, even if this result in damage to holders of patent rights. *Boston Store* v. *American Graphophone Co.*..... 8

JURISDICTION—*Continued.* PAGE

7. A suit to restrain Assistant Postmaster General from annulling a contract and from interfering with its performance, his action being purely official, discretionary, and within the scope of his duties, *held* in effect a suit against the United States and therefore properly dismissed. *Wells* v *Roper* 335

8. A transgression of its statutory power by an administrative board is subject to judicial restraint, although guised as a discretionary decision within its jurisdiction. *Waite* v. *Macy* 606

9. Courts not justified, except in clear case, in annulling order of Interstate Commerce Commission setting aside rate as unreasonably high. *Manufacturers Ry. Co.* v. *United States* 457

10. A court cannot substitute its judgment for that of the Interstate Commerce Commission upon a purely administrative matter. *Id.*

11. Decisions of Interstate Commerce Commission as to whether a discrimination is undue and unreasonable or unjust, made basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Id.*

II. **Jurisdiction over the person.**

1. General rule as to the doing of business which will subject a corporation to service of process is that business must be of nature warranting inference that corporation has subjected itself to the local jurisdiction, and is, by duly authorized officers or agents, present within State or district where service is attempted. *People's Tobacco Co.* v. *American Tobacco Co* 79

2. A revocation by a corporation of its designation of a former manager of a branch as its agent on whom process might be served, *held* effectual when executed by a vice-president without formal sanction by board of directors. *Id.*

3. Service of process in Louisiana on former manager there of corporation found to have undertaken in good faith to

JURISDICTION—*Continued.* PAGE

carry out a decree of dissolution and to divest itself of a former branch business in that State, *held* ineffectual to bind the corporation. *Id.*

4. The fact that foreign corporation owns stock in local, subsidiary companies, does not bring it within a State for purpose of service of process upon it; nor does practice of advertising its wares in the State and sending into it its agents, who, without authority to make sales, to collect money or extend credit, merely solicit orders of the retail trade to be turned over to local jobbers, to whom corporation sells its goods and who charge retailers therefor. *Id.*

5. Louisiana Act of 1904, as amended in 1908, *held* inapplicable to foreign corporations which have withdrawn from the State and ceased to do business there at time of service of process. *Id.*

III. **Jurisdiction of This Court.**

(1) *Original.*

1. The original jurisdiction conferred upon this court over controversies between States includes power to enforce its judgment by appropriate remedial processes, operating where necessary upon the governmental powers and agencies of a State. *Virginia* v. *West Virginia* 565

2. The authority to enforce its judgments is of the essence of judicial power and this elementary principle applies to original jurisdiction in controversies between States. *Id.*

3. Origin and purpose of constitutional provision reviewed. *Id.*

4. It was the clear intention of the Constitution to forestall for the future the dangers of state controversies by uniting with the power to decide them the power to enforce the decisions against States. To this power the reserved powers of the States necessarily are subordinate. *Id.*

5. The power to decide and enforce, comprehensively considered, are sustained by every authority of the Federal Government, judicial, legislative and executive, which may be appropriately exercised. *Id.*

6. Court will appoint commission to run, locate and designate boundary line between two States, and determine na

JURISDICTION—*Continued.* PAGE

ture and extent of erosions and accretions occurring in old channel of boundary river. *Arkansas* v. *Tennessee* 158

(2) *Over District Courts.*

7. Whether, in view of limitations of Constitution, Congress has power to exempt from state taxation land purchased for tribal Indian from mass of private property subject to state taxing power and jurisdiction, is a substantial constitutional question, affording ground for direct appeal from District Court. *McCurdy* v. *United States* 263

8. Upon direct appeal from District Court, based upon constitutional question, all questions involved are open for review and there is no occasion to consider constitutional question if case may be disposed of on other grounds. *Id.*

(3) *Over State Courts.*

9. If state supreme court treats federal questions as necessarily involved and decides them adversely to plaintiff in error, this court has jurisdiction to review them, although not specially characterized as federal questions by plaintiff in error in state courts. *Cissna* v. *Tennessee* 289

10. Jurisdiction exists to review judgment of supreme court of State where issues as to whether lands in question were owned by State, and whether they, and alleged trespasses upon them, were within State, were determined affirmatively through location of state boundary based upon interpretation of various treaties and acts of Congress. *Id.*

11. Whether two States, either by long acquiescence in practical location of their common boundary or by agreement otherwise evidenced, have changed the limits of their jurisdiction as laid down by authority of the general government in treaty or statute, is in its nature a federal question. *Id.*

12. Whether state court has correctly followed rules of erosion, accretion or avulsion applicable to interstate boundary streams so as to give proper effect to treaties and acts of Congress establishing a river as an interstate boundary, is a question of federal law. *Id.*

JURISDICTION—*Continued.* PAGE

13. Where complaint states a cause under Federal Employers' Liability Act, but plaintiff fails to prove that employee was engaged in interstate commerce when injured, a contention that the case was removable from state to federal court because of diverse citizenship is not a claim of federal right of sufficient substance to afford this court jurisdiction to review a state court's judgment. *Great Northern Ry.* v. *Alexander* 276

14. Whether state court has obeyed local rule of practice requiring substitution of correct instructions for defective ones requested, is question of state law not reviewable in action under Employers' Liability Act. *Louis. & Nash. R. R.* v. *Holloway* 525

15. When not based upon an erroneous theory of federal law, refusal of state court to reverse judgment upon ground that damages are excessive is not reviewable in action under Employers' Liability Act. *Id.*

16. Where state courts have found sufficient evidence to sustain verdict for plaintiff in action under Employers' Liability Act, this court will go no farther than to ascertain that there is evidence supporting the verdict. *Great Northern Ry.* v. *Donaldson* 121

17. This court has jurisdiction to review judgment sustaining lien on client's cause of action given to attorney by state law, upon intervention of attorney in action under Employers' Liability Act, where question of inconsistency of such provision with that act was called to attention of state trial and supreme courts and discussed by latter. *Dickinson* v. *Stiles* 631

18. Upon error to state court in suit to recover back earnest-money on ground of unmerchantable title, in which vendor proved conveyance of land by certain heirs of Indian allottee thereof, which recited that they were the only heirs and was approved by the Secretary of the Interior, *held*, that whether burden was upon plaintiff to establish that there were other heirs, and whether suggestion that there may have been such rendered title unmerchantable, were questions of state law not reviewable by this court. *Egan* v. *McDonald* 227

JURISDICTION—*Continued.* PAGE

19. If decision of state court rests upon ground of general law adequate to support it, independently of decision upon alleged violation of federal right, the case not reviewable here. *Municipal Securities Corporation* v. *Kansas City* 63
Bilby v. *Stewart* 255

20. Where probate of will of full-blood Creek Indian refused solely on ground of mental incapacity, questions sought to be raised under acts of Congress *held* immaterial. *Bilby* v. *Stewart* 255

21. Under Jud. Code, § 237, as amended, final judgment of state court not reviewable by writ of error if no treaty, statute or authority exercised under State or United States drawn in question. *Stadelman* v. *Miner* 544

22. Objection that judgment of state court ordering sale real estate denies due process to nonresident parties served by publication, in that order was made before service was complete under state statutes, does not draw in question validity of authority exercised under State, within meaning of § 237, Jud. Code, as amended. *Id.*

23. Jurisdiction to review by writ of error under § 237, Jud. Code, as amended, confined to cases in which validity of treaty or statute of, or authority exercised under, United States is drawn in question, and decision against validity; and those in which validity of statute of, or authority exercised under, State drawn in question on ground of repugnancy to Constitution, treaties or laws of United States, and decision in favor of validity. When, however, state court's judgment upholds federal treaty, statute or authority against claim of invalidity, or denies validity of state statute or authority upon attack based on federal grounds, or when basis of this court's jurisdiction is claim of federal title, right, privilege or immunity, decided for or against party claiming, review can be had only by certiorari. *Ireland* v. *Woods* 323

24. Writ of error allowed as of right, in cases designated therefor by statute, when federal question real and substantial and an open one in this court; but certiorari is granted or refused in exercise of court's discretion. *Id.*

25. Foregoing limitations apply in *habeas corpus* cases as in others sought to be reviewed under Jud. Code, § 237. *Id.*

JURISDICTION—*Continued.* PAGE

26. Where person held for interstate rendition obtained *habeas corpus* on ground that he was not a fugitive from justice, *held*, that contention did not draw in question validity of authority exercised under the arresting State by its governor in issuing his warrant and holding petitioner for removal, but merely correctness of the exercise, and that judgment of state court holding, on the indictment and evidence, that petitioner was a fugitive, and dismissing the *habeas corpus*, was not reviewable by writ of error under Jud. Code, § 237. *Id.*

IV. **Jurisdiction of District Courts.**

(1) *Removal Proceedings.*

1. Where complaint states cause under Federal Employers' Liability Act, failure of plaintiff to prove that employee was engaged in interstate commerce when injured will not leave case removable because of diverse citizenship appearing in complaint. *Great Northern Ry.* v. *Alexander* 276

2. A case arising under Federal Employers' Liability Act between citizens of different States not removable from a state to a federal District Court on either ground. *Id.*

3. In absence of fraudulent purpose to defeat removal, the status, with respect to removability, of a case alleged to be one arising under such act depends not upon what the defendant may allege or prove or what the court may, after hearing upon merits, *in invitum* order, but solely upon the form which the plaintiff voluntarily gives to his pleadings initially and as the case progresses. *Id.*

4. Upon theory that refrigerator car company, defendant in action for damages of less than $3,000 to goods in interstate transit, and railroad were partners as to shipments, former would become common carrier *pro hac vice*, and the amount involved would be insufficient for purposes of removal to District Court. Act of 1914, amending Jud. Code, § 28. *Emery & Co.* v. *American Refrigerator Co.* 634

(2) *Diversity of Citizenship.* See (1), *supra.*

5. A suit which, in an essential feature, is suit to annul will, and which under state law is in character merely supplemental to proceedings for probate and cognizable only

JURISDICTION—*Continued.* PAGE

by probate court, is not within jurisdiction of District Court though diversity of citizenship exists and requisite jurisdictional amount is in controversy. *Sutton* v. *English* .. 199

6. In suit in District Court to set aside testamentary dispositions and adjudge the property to plaintiffs and partition it among them as heirs, a defendant who, being also an heir, would share in the relief if obtained, should not be aligned as a plaintiff for the purpose of testing jurisdiction by diversity of citizenship, if such defendant be adversely interested as legatee. *Id.*

7. Court has jurisdiction of bill which, besides showing diverse citizenship, alleged that certain personal property of plaintiff had been forcibly taken from its possession in Mexico by unknown persons, was consigned to one of defendants in this country and was in possession of Collector of Customs, also a defendant, who unless restrained as prayed would deliver it to other defendants; and the fact, not mentioned in the bill, that the property had been seized, condemned and sold for war purposes by Constitutionalist forces in revolution in Mexico, whose government was later recognized by United States, did not deprive courts of jurisdiction to adjudicate upon validity of title thus acquired, though action of Mexican authorities must necessarily be accepted as a rule of decision. *Ricaud* v. *American Metal Co.* 304

(3) *Under Contract Clause.*

8. Court has jurisdiction over suit in which telephone company, occupying streets of a city under ordinances, seeks to enjoin, as unconstitutional, execution of later ordinance by which city declares company's rights at end, assumes power to terminate them, and declares purpose to take steps to secure removal of lines and exchange. *City of Mitchell* v. *Dakota Tel. Co.* 396

(4) *As to Orders of Interstate Commerce Commission.*

9. District Court has no jurisdiction under Commerce Acts to exercise administrative authority when Commission has failed or refused to exercise it, or to annul orders of the Commission not amounting to an affirmative exercise of its powers. So *held* where the Commission fixed maximum joint rates for trunk lines and a terminal company, and the

JURISDICTION—*Continued.* PAGE

gravamen of the latter's suit was the failure to fix the divisions. *Manufacturers Ry. Co.* v. *United States* 457

See I, 9, 10, 11, *supra.*

(5) *Suits Arising under Patent Laws.*

10. Where bill claimed protection for a price-fixing contract under the patent laws, and want of merit in claim was not so conclusively settled by decision when bill filed as to make claim frivolous, court had jurisdiction to determine whether suit arose under those laws. *Boston Store* v. *American Graphophone Co.* 8

(6) *Review of Master.*

11. Court may, upon exceptions, review findings of special master appointed by it. *Denver* v. *Denver Union Water Co.* 178

V. **Jurisdiction of Court of Claims.**

1. Jurisdiction under § 162, Jud. Code, is limited to claims based on ownership at time of seizure. *Thompson* v. *United States* 547

2. Where owner of cotton sold it to Confederate Government, accepting Confederate bonds in full payment and agreeing to care for and deliver it as ordered, and cotton was seized under Act of 1863 while still in his possession, *held* that he was neither owner nor lienor and there was no basis for suit by his administrator. *Id.*

3. Claimant against District of Columbia suing under Act of 1880, not entitled to receive interest as such, save any that may accrue after rendition of judgment, where recovery not based upon contract expressly stipulating for interest. *Sheckels* v. *District of Columbia* 338

4. Provision of § 6 of Act of 1880 for satisfying such judgments with bonds bearing coupons for interest from date upon which the claims were due and payable, amounted to giving interest, at a limited rate, before and after judgment, where payment made in that mode; but as to amount of claim allowed, not so satisfied, interest prior to judgment not allowable. *Id.*

VI. **Jurisdiction of State Courts.**

1. State court has jurisdiction to decide whether owner of railroad within its territory is under public duty to main-

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tain offices and shops at particular places, even though it were assumed, as a rule of decision, that a foreclosure and confirmed sale in a federal court conferred immunity from obligation which that court alone could withdraw. *International & G. N. Ry.* v. *Anderson County* 424

2. Texas county court has no equitable jurisdiction of suit *inter partes* to annul dispositions in will and partition property among heirs, where title to land is involved and amount in controversy exceeds $1,000. *Sutton* v. *English* .. 199

3. Texas district courts have no jurisdiction to annul by an original proceeding the action of a county court in probating a will, and a suit under Stats., Art. 5699, to contest validity of will so probated, must be brought in county court and calls for exercise of original probate jurisdiction. *Id.*

VII. **Jurisdiction of Supreme Court of District of Columbia.**

In absence of other modes of judicial review, court has power to direct Interstate Commerce Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared not to be within its jurisdiction. *Louisville Cement Co.* v. *Interstate Com. Comm.*..... 638

JURY AND JURORS.

Instructions. See **Employers' Liability Act,** 6, 7, 9–13.

LAND GRANTS. See **Public Lands.**

LANDLORD AND TENANT. See **Intoxicating Liquors.**

LEASE:

Oil and gas leases in Indian lands. See **Indians,** 9–12.

Liability of lessor of premises for sale of intoxicants under Illinois Dram Shop Act. See **Intoxicating Liquors.**

1. In estimating value of leasehold to lessee, taxes paid by lessor should not be deducted from the annual cost as measured by the gross rental. *Manufacturers Ry. Co.* v. *United States* 457

LEASE—*Continued.* PAGE

2. Where a city leased for railway purposes land which in considerable part constituted a public wharf, at a rental less than the fair annual value, presumption is that excess was granted to public and not to private interest of carrier, in capitalizing its assets for purpose of testing adequacy of rate. *Id.*

LICENSE TAXES. See **Taxation.**

LIENS.

Judgment operating as lien on premises where intoxicants sold. See **Intoxicating Liquors.**

Acceptance of Confederate bonds in payment of, and agreement to care for and deliver as ordered, cotton sold Confederate Government, which was seized under Abandoned Property Act of 1863 while still in vendor's possession, does not constitute him owner or lienor within that act to support action in Court of Claims under Jud. Code, § 162. *Thompson* v. *United States* 547

LIFE INSURANCE. See **Insurance.**

LIMITATION OF LIABILITY. See **Admiralty; Interstate Commerce Acts,** II, 1, 2.

LIMITATIONS. See **Franchises.**

1. A statute of limitations should be strictly construed in favor of the Government. *United States* v. *Whited & Wheless* 552

2. The limitation provision in the Act of 1891 relative to suits to vacate and annul patents was designed for security of patent titles and does not apply to action at law to recover value of patented land as damages for deceit practiced by defendant in procuring patent. *Id.*

3. Where there are two remedies for the protection of the same right, one may be barred and the other not. *Id.*

4. As to time within which complaints for recovery of damages shall be filed with Interstate Commerce Commission. See *Louisville Cement Co.* v. *Interstate Com. Comm.* 638

LIQUOR LAWS. See **Intoxicating Liquors.**

LIVE STOCK: PAGE

Validity of Idaho sheep and cattle segregation law. See *Omaechevarria* v. *Idaho* 343

Twenty-eight Hour Law. See **Interstate Commerce Acts,** II, 7, 8.

Limitation of liability of carrier on live stock contract. See **Interstate Commerce Acts,** II, 1, 2.

LOCAL BUSINESS. See **Constitutional Law,** III; **Jurisdiction,** II.

LOCAL LAW. See **Jurisdiction,** III, (3); VI.

MANDAMUS:

1. Not available to review erroneous denial of motion for substitution of party to suit in District Court. *Ex parte Slater* 128

2. Supreme Court of District of Columbia may direct Interstate Commerce Commission to entertain and proceed to adjudicate cause which it has erroneously declared not to be within its jurisdiction. *Louisville Cement Co.* v. *Interstate Com. Comm* 638

3. Petition for mandamus should give a correct, uncolored statement of the matter concerning which it seeks relief. *Ex parte Slater* 128

4. Function of writ when directed to judicial officers. *Id.*

5. Is it available to compel state legislature to levy tax to satisfy judgment in an original case? *Virginia* v. *West Virginia* 565

MANDATE. See **Procedure,** III.

MARITIME LAW. See **Admiralty.**

MASSACHUSETTS:

1. Stats. 1909, c. 490, Pt. III, § 56, imposing an annual excise upon every foreign corporation, for the privilege of doing local business, of a given per cent. of par value of its authorized capital stock, subject, however, to a maximum limit of $2000, *held* valid, as to corporation doing local as well as interstate business. *Cheney Brothers Co.* v. *Massachusetts* 147

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2. Tax exacted under § 1, c. 724, Stats. 1914, for privilege of doing local business, from a foreign corporation largely engaged in interstate commerce, and whose property and business were largely in other States, *held* void. *International Paper Co.* v. *Massachusetts* 135
Locomobile Co. v. *Massachusetts*..... 146

MASTER AND SERVANT. See **Employers' Liability Act.**

MASTERS:

1. Right reserved to appoint master to examine and report concerning amount and method of taxation essential, and other means available, to satisfy judgment of this court in suit between States. *Virginia* v. *West Virginia*..... 565

2. Findings of special master *held* not conclusive, but subject to review by District Court upon exceptions. *Denver* v. *Denver Union Water Co.*..... 178

MATERIALMEN'S ACTS:

Groceries and provisions furnished government contractor for use of laborers are, under certain circumstances, materials used "in the prosecution" of the work within the meaning of the materialmen's Acts of 1894, 1905. *Brogan* v. *National Surety Co.*..... 257

MEASURE OF DAMAGES. See **Employers' Liability Acts,** 10–13. **Public Lands,** V, 2.

MEXICO. See **International Law,** 4.

MINORS. See **Indians,** 5, 6; **Parent and Child.**

MISSISSIPPI RIVER:

As boundary between Arkansas and Tennessee. See **Boundaries.**

MONOPOLIES. See **Anti-Trust Act; Patents for Inventions.**

MORTGAGES AND DEEDS OF TRUST. See **Railroads,** 2–6.

Capacity of minor to make mortagage. See **Philippine Islands.**

MUNICIPAL CORPORATIONS. See **Franchises; Streets and Highways; Street Railways; Water Companies.**

NATIONAL BANKS:

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1. Section 5209, Rev. Stats., punishing embezzlement, etc., does not apply to receiver appointed by Comptroller of Currency under § 5234. *United States* v. *Weitzel* 533

2. Such receiver is an officer of the United States and not an agent of the bank. *Id.*

NAVIGABLE WATERS. See **Boundaries; Waters.**

NEGLIGENCE. See **Employers' Liability Act.**

NOTICE. See **Constitutional Law**, VII, (1)
Constructive. See **Indians**, 11; **Public Lands**, I, 4.

OIL AND GAS LEASES. See **Indians**, 9–12.

ORDINANCES. See **Franchises.**

ORIGINAL JURISDICTION. See **Jurisdiction**, III, (1).

OSAGE INDIANS:

Right of Secretary of Interior to impose restrictions upon private land purchased for non-competent allottee with trust money. See *McCurdy* v. *United States* 263

PARENT AND CHILD:

1. As to cases existing at time of enactment, Philippine Code of Civil Procedure did not displace system of parental control and usufructuary interest defined by Civil Code respecting property of minor children; and therefore the right of parent to emancipate minor children and thus endow them with capacity to make a valid mortgage of their real estate persisted notwithstanding Code of Civil Procedure. *Ibanez* v. *Hongkong Banking Corp.* 621

2. Section 581 of Code of Civil Procedure is construed broadly as relating not merely to court proceedings, but as expressly preserving existing powers and usufructuary rights of parents over property of minor children, existing under Civil Code. *Id*

PARTIES:

1. A State is not affected by judicial determinations involv-

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ing a boundary in cases in which she is not a party. *Arkansas* v. *Tennessee* 158

2. In suit in District Court to set aside testamentary dispositions and adjudge the property to plaintiffs and partition it among them as heirs, a defendant who, being also an heir, would share in the relief if obtained, should not be aligned as a plaintiff for the purpose of testing jurisdiction by diversity of citizenship, if such defendant be adversely interested as legatee. *Sutton* v. *English* 199

3. Right of substitution upon death of party depends upon recognized legal and equitable principles to be judicially applied; and where, after due hearing, a motion is denied, the ruling, if erroneous, may be corrected upon appeal, but cannot be reviewed by mandamus. *Ex parte Slater* 128

4. Death of one of the solicitors held to suspend, until substitution of party, proceedings under decree directing that sum in registry of court be distributed among several solicitors in proportion to their respective services and for retention of control by court to make and carry out the apportionment. *Id.*

5. Substitution of party, formerly effected by bill of revivor, or bill of that nature, is now ordered upon motion under new Equity Rule 45. *Id.*

PARTNERSHIP. See **Admiralty**, 3; **Carriers**, 1.

PATENTS FOR INVENTIONS:

Jurisdiction of District Court to entertain bill claiming protection for price-fixing contract under patent laws. See **Jurisdiction**, IV, (5).

1. Courts must apply the patent law as they find it; the remedy for damage or insufficient protection must come from Congress. *Boston Store* v. *American Graphophone Co.*... 8

2. Act of June 25, 1910, does not automatically confer a general license on Government to use patented inventions or authorize their use at the will of private parties in the manufacture of things to be furnished under contracts between them and the United States. The act does not operate to relieve the contractor from liability to account

PATENTS FOR INVENTIONS—*Continued.* PAGE

for the damages and profits arising from the infringement. *Cramp & Sons* v. *Curtis Turbine Co.* 28
Marconi Wireless Co. v. *Simon* 46

3. Where appliances called for by a contract with the Government were so far incomplete that their making and furnishing would at most contribute to infringement by the Government in adjusting and using them for essential governmental purposes, the acts complained of would not be illegal or subject to injunction, in view of the Act of 1910. *Marconi Wireless Co.* v. *Simon* 46

4. Where the lower court treated as irrelevant the nature of the infringement—whether direct or contributory, *held* that the case should be remanded for consideration and determination of the rights of the parties in the light of this court's construction of the Act of 1910, not overlooking petitioner's contentions that making the appliances for the Government before the contract was completed, and making them for persons other than the Government, would constitute direct infringements. *Id.*

5. Recent decisions denying right of patent owners, in selling patented articles, to reserve control over resale or use, were not rested upon any mere question of form of notice attached to articles or right to contract solely by reference to such notice, but upon fundamental ground that control of patent owner ended with passing of title. *Boston Store* v. *American Graphophone Co.* 8

6. Where patent owner delivers patented articles to dealer by transaction which, essentially considered, is a completed sale, stipulations in contract that articles may not be resold at prices other or lower than those fixed by the patent owner are void under the general law, and are not within monopoly conferred, or remedies afforded by the patent law. *Id.*

PATENTS FOR LAND. See **Indians: Public Lands.**

PAYMENT:

Having given bond to secure a contract with Navy Department, claimant paid premiums after alleged compliance with condition, and sued to recover amount, contending that Secretary of Navy should have canceled the bond and noti-

PAYMENT—*Continued.* PAGE

fied the surety. It not appearing that claimant had bound itself to continue paying premiums until Secretary so acted, *held*, that the payment was voluntary and gave no cause of action in Court of Claims. *Bethlehem Steel Co.* v. *United States* 523

PENALTIES AND FORFEITURES.

Railroad company not availing of opportunity given by state law to test validity of order of state commission cannot be relieved from cumulation of penalties due to its violations of order while awaiting proceedings by State. *Gulf, Colorado &c. Ry.* v. *Texas* 58

PERSONAL INJURY. See **Employers' Liability Act.**

PHILIPPINE ISLANDS:

1. As to cases existing at time of enactment, Code of Civil Procedure did not displace system of parental control and usufructuary interest defined by Civil Code respecting property of minor children; and therefore the right of parent to emancipate minor children and thus endow them with capacity to make a valid mortgage of their real estate persisted notwithstanding Code of Civil Procedure. *Ibanez* v. *Hongkong Banking Corp.* 621

2. Section 581 of Code of Civil Procedure is construed broadly as relating not merely to court proceedings, but as expressly preserving existing powers and usufructuary rights of parents over property of minor children, existing under Civil Code. *Id.*

3. Court accepts lower courts' interpretation of law (Civ. Code, Art. 1851) to effect that mere failure of creditor to sue when obligation in whole or in part matures does not extend its term, and that to extinguish surety's liability extension must be based on some new agreement by which creditor deprives himself of right immediately to enforce claim. *Ibanez* v. *Hongkong Banking Corp.* 627

PLEADING:

1. Petition for mandamus should give a correct, uncolored statement of the matter concerning which it seeks relief. *Ex parte Slater* 128

PLEADING—*Continued.* PAGE

2. General allegations of fraud and insolvency *held* not to supply the absence of facts entitling plaintiff to equitable relief. *Sears* v. *City of Akron* 242

3. Substitution of party, formerly effected by bill of revivor, or bill of that nature, is now ordered upon motion under new Equity Rule 45. *Ex parte Slater* 128

4. Error in ruling denying plea in abatement in action to foreclose mortgage, setting up pending action to annul mortgage, *held* to have been harmless in view of judgment in the earlier action by which validity of mortgage correctly sustained. *Ibanez* v. *Hongkong Banking Corporation* 627

5. As to sufficiency of statement of facts in certificate from Circuit Court of Appeals. See *Ricaud* v. *American Metal Co.* 304

POLICE POWER:

1. A law primarily designed to preserve the peace is not an unreasonable or arbitrary exercise of the police power: so *held* as to Idaho sheep and cattle segregation law. *Omaechevarria* v. *Idaho* 343

2. Police power of a State extends over the federal public domain, at least in absence of legislation by Congress. *Id.*

3. Police power extends to requiring railroad companies, at own expense, to make streets and highways crossed by their tracks reasonably safe and convenient for public use. *Great Northern Ry.* v. *Clara City* 434

POLITICAL QUESTIONS. See **International Law.**

POSTMASTER GENERAL:

Suit to restrain Assistant. See **Actions and Defenses, 1.**

PRE-EMPTION SETTLEMENT. See **Public Lands, II.**

PRESUMPTIONS. See **Interstate Commerce Acts, I, 17.**

Presumption that administrative officers will follow the law not indulged where intention to obey an illegal regulation of their superior is not directly disclaimed by them and is admitted by their counsel. *Waite* v. *Macy* 606

PRINCIPAL AND SURETY. See **Bonds; Philippine Islands,** 3. PAGE

PRIVILEGES AND IMMUNITIES. See **Constitutional Law,** VI; VII (3).

PRIVILEGE TAXES. See **Taxation.**

PROBATE JURISDICTION. See **Jurisdiction,** III, 20; IV, 5, 6; VI, 2, 3.

PROCEDURE: See **Masters.**

I. **Error, Appeal or Certiorari.** See **Jurisdiction.**

II. **Scope of Review.**

1. There is no occasion to consider constitutional question if case may be disposed of on other grounds. *McCurdy* v. *United States* 263

2. In so far as it depends upon the testimony, verdict of jury, upon issues requested by complaining party, finding that state regulation as to location of railway offices and shops does not burden interstate commerce will be accepted. *International & G. N. Ry.* v. *Anderson Co.* 424

3. Court accepts lower courts' interpretation of Philippine law (Civ. Code, Art. 1851) to effect that mere failure of creditor to sue when obligation in whole or in part matures does not extend its term, and that to extinguish surety's liability extension must be based on some new agreement by which creditor deprives himself of right immediately to enforce claim. *Ibanez* v. *Hongkong Banking Corporation* 627

4. Where master appointed with consent of parties to take testimony and report it with findings of fact and conclusions of law, had heard issues fully and admitted all proffered evidence, and exceptions to findings raised no serious questions of fact, case not remanded to District Court because it erroneously declined to pass upon the exceptions. *Denver* v. *Denver Union Water Co.* 178

III. **Scope and Form of Decree.**

1. Form of mandate where, in suit to restrain a contractor with the Government from making and delivering appliances on the ground of infringement of petitioner's patent

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rights, the lower court erroneously treated as irrelevant the nature of the infringement—whether direct or contributory. *Marconi Wireless Co.* v. *Simon* 46

2. Intimated that, but for character of proceeding (mandamus) and doubt as to intent, damages would have been inflicted under Rule 23 on plaintiff in error for prosecuting writ of error. *Smith* v. *Jackson* 388

3. Judgment of trial court modified to correct clerical error appearing by trial court's opinion and concession of counsel. *Ibanez* v. *Hongkong Banking Corporation* 627

4. Decree of injunction properly expressed as perpetual. *International & G. N. Ry.* v. *Anderson Co* 424

IV. **Rehearing.**

1. Case having been dismissed for want of federal question, court grants leave to file, and treats as filed, petition for rehearing, and orders that case stand for consideration on prior submission, the fact that federal question was raised and decided on former hearing in state court being shown by official report of its opinion which counsel failed to include in record or refer to in briefs and argument. *Stadelman* v. *Miner* 311

2. Attempt to raise federal question through application to file second petition for rehearing in state court comes too late. *Bilby* v. *Stewart* 255

V. **Certificate from Circuit Court of Appeals.**

1. Certificates of the facts constituting the basis for questions propounded should be prepared with care and precision. *Boston Store* v. *American Graphophone Co.* 8

2. The requirement as to statement of facts in a certificate from Circuit Court of Appeals is not complied with by a statement of what is "alleged and denied" by the parties in their pleadings, supplemented by statement that there was evidence tending to establish the facts as claimed by each party; nor should the questions be based upon an "assumed" statement of facts. *Ricaud* v. *American Metal Co.* 304

3. Facts supplied by judicial notice may enable court to answer questions from Court of Appeals, where otherwise insufficiency of certificate would necessitate its return. *Id.*

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VI. **Substitution of Parties.**

1. Right of substitution upon death of party depends upon recognized legal and equitable principles to be judicially applied; and where, after due hearing, a motion is denied, the ruling, if erroneous, may be corrected upon appeal, but cannot be reviewed by mandamus. *Ex parte Slater* 128

2. Death of one of the solicitors held to suspend, until substitution of party, proceedings under decree directing that sum in registry of court be distributed among several solicitors in proportion to their respective services and for retention of control by court to make and carry out the apportionment. *Id.*

3. Substitution of party, formerly effected by bill of revivor, or bill of that nature, is now ordered upon motion under new Equity Rule 45. *Id.*

VII. **Objections; when to be Made.**

Objection of unconstitutionality of rate-fixing order should be made, and all evidence pertinent thereto adduced, before the Interstate Commerce Commission in the first instance if possible. *Manufacturers Ry. Co.* v. *United States* . . 457

PROCESS, SERVICE OF. See **Jurisdiction,** II; III, 22.

PROXIMATE CAUSE. See **Employers' Liability Act,** 8.

PUBLIC CONTRACTS. See **Contracts,** 3–7.

PUBLIC LANDS:

I. Homesteads; Fencing Laws; Bona Fides, p. 738.
II. Pre-emption Settlement, p. 739.
III. Occupancy for Grazing, p. 739.
IV. Railroad Grants and Public Reservations, p. 740.
V. Annulment of Patents, p. 741.
VI. Police Power of States, p. 741.

I. **Homesteads; Fencing Laws; Bona Fides.**

1. Enclosure of public land, accompanied by actual possession under claim of right and color of title, in good faith, is not obnoxious to Fence Act of 1885, nor subject, under

PUBLIC LANDS—*Continued.* PAGE

Homestead Law, to be broken or entered for purpose of initiating homestead claim. *Denee* v. *Ankeny* 208

2. Attempt to establish settlement by stealth and retain it by force against one in peaceable possession as *bona fide* claimant is not countenanced by Homestead Law. *Id.*

3. In such case state law providing for summary restoration of possession so displaced without inquiry into title or right of possession, applies, and presents no conflict between state and federal laws. *Id.*

4. One who purchases under a receiver's receipt, issued upon a soldier's additional homestead entry, land, which is in the actual possession of another claiming from another source under recorded deeds, is constructively notified of that other's claim and of that other's rights as so revealed; and also—through the receiver's receipt—of the origin of his own title and therein of the fact that it was procured by means of affidavits falsely stating that the land was unoccupied, unimproved and unappropriated. *Krueger* v. *United States* 69

II. **Pre-emption Settlement.**

1. Lands within limits of incorporated city, whether actually occupied or sought to be entered as a townsite or not, were excluded from acquisition under Pre-emption Act. *Salt Lake Investment Co.* v. *Oregon Short Line* 446

2. Attempted pre-emption settlement on such land, and filing of declaratory statement in local land office, do not affect disposing power of Congress or operate to exclude tract from subsequent grant of right of way "through the public lands" containing no excepting clause. *Id.*

3. Act of 1877 did not confirm or provide for confirming such absolutely void pre-emption claims so as to disturb rights vested before date of act under a railroad right of way grant. *Id.*

III. **Occupancy for Grazing.** See I, *supra.*

1. The clause in § 1 of act to prevent unlawful occupancy of the public lands, prohibiting assertion of right to exclusive use and occupancy of any part of the public lands without claim or color of title made or acquired in good

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faith, prohibits merely the assertion of an exclusive right to use or occupation by force, intimidation, or by what would be equivalent in effect to an enclosure.. *Omaechevarria* v. *Idaho* 343

2. Idaho sheep and cattle segregation law (Rev. Codes, 1908, § 6872) is not in conflict with clause in § 1 of act to prevent unlawful occupancy of the public lands, as, in so far as the exclusion of sheep from certain ranges approaches a grant, the result is incidental only. *Id.*

3. Congress has not conferred on citizens the right to graze stock on the public lands, their use for that purpose being merely by sufferance. *Id.*

4. Exclusion of sheep owners, under circumstances, from use of the public domain, provided for in Idaho sheep and cattle segregation law, does not interfere with any right of a citizen of the United States. *Id.*

IV. **Railroad Grants and Public Reservations.**

1. Act granting right of way to Utah Central Railroad Company applied to public lands over which road had been constructed within corporate limits of Salt Lake City but which never were occupied as a townsite or attempted to be entered as such. Townsite Act not inconsistent with this conclusion. *Salt Lake Investment Co.* v. *Oregon Short Line* ... 446

2. Lands opposite line of Northern Pacific Railroad constituting an Indian reservation when line definitely located, were not embraced in grant made to company by Act of 1864. *Northern Pac. Ry.* v. *Wismer* 283

3. A reservation of public lands for and exclusively devoted to occupancy of tribe of Indians, made under direction and with approval of Commissioner of Indian Affairs, and approved by Secretary of Interior, *held* valid and effectual to exclude the lands from such grant, although not formally sanctioned by President until after railroad had filed its map of definite location. *Id.*

4. Land, part of odd-numbered section within primary limits but covered by a valid pre-emption filing at date of definite location of right of way, was excepted from grant

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made to Denver Pacific Railway & Telegraph Co. *Krueger* v. *United States* 69

5. One who under deed of such company and through mesne conveyances came into, and retained, possession of a parcel of land which, because of pre-emption filing, was excepted from the grant to the company, *held* to be in position to acquire full title by purchase under Adjustment Act of 1887 and regulations of Land Department. *Id.*

6. Effect of grant of right of way to Big Horn Southern Railroad Company through Crow Reservation. *United States* v. *Soldana* 530

V. **Annulment of Patents.**

1. The limitation provision in the Act of 1891 relative to suits to vacate and annul patents was designed for security of patent titles and does not apply to action at law to recover value of patented land as damages for deceit practiced by defendant in procuring patent. *United States* v. *Whited & Wheless* 552

2. Provision of Act of 1896 limiting Government's money recovery to minimum government price, not applicable in case in which Government seeks money damages because of deceit practiced in procuring patent under Homestead Law. *Id.*

3. Defense of *bona fide* purchase is affirmative; burden is on party making it, in suit by United States to cancel patent for fraud. *Krueger* v. *United States* 69

VI. **Police Power of States.**

Police power of a State extends over the federal public domain, at least in absence of legislation by Congress. *Omaechevarria* v. *Idaho* 343

PUBLIC WORKS. See **Contracts**, 4–7.

PURE FOOD AND DRUGS ACT. See **Food and Drugs Act.**

RAILROAD GRANTS. See **Public Lands**, IV.

RAILROADS. See **Carriers; Employers' Liability Act; Franchises; Interstate Commerce Acts; Public Lands; Taxation.** PAGE

1. Police power extends to requiring railroad companies, at own expense, to make streets and highways crossed by their tracks reasonably safe and convenient for public use by making sidewalk across right of way. *Great Northern Ry. Co.* v. *Clara City* 434

2. State court has jurisdiction to decide whether owner of railroad within its territory is under public duty to maintain offices and shops at particular places, even though it were assumed, as a rule of decision, that a foreclosure and confirmed sale in a federal court conferred immunity from obligation which that court alone could withdraw. *International & G. N. Ry.* v. *Anderson County* 424

3. Foreclosure and sale in federal court will not relieve purchaser from contractual or statutory duty, which rested on its predecessors under state law, to maintain offices and shops at a particular place, if state law holds obligation indelible by foreclosure. *Id.*

4. Prohibition against removal of offices and shops located by contract with county in consideration of county bond aid, extends, under Texas Act of 1889, to successor by mortgage foreclosure of contracting railroad. *Id.*

5. A statute providing that offices and shops shall be at place named in charter, or if no certain place there named then at such place as company shall have contracted to locate them, does not intend that a valid contract for location may be evaded by a purchasing company by naming another place in its charter filed under a general law. *Id.*

6. *Semble*, that contract to maintain offices and shops at a particular place survives mortgage foreclosure and sale where purchaser succeeds to mortgagor's franchise to be corporation; and that, generally speaking, state legislature, dealing with a local railroad corporation, has power to fix place of domicile and principal offices. *Id.*

7. Street railways and steam roads differentiated as respects municipal granting power. *Covington* v. *South Covington St. Ry. Co.* 413

RAILROADS—*Continued.* PAGE

8. As to constitutional validity of order of state commission ordering stoppage of interstate trains. See **Constitutional Law**, III, 2–5.

RATES. See **Carriers**, 3; **Interstate Commerce Acts**; **Water Companies.**

RECEIVERS:

1. Bank in which special deposits were made construed as "receiver" within meaning of § 3647, California Pol. Code. *Spring Valley Water Co.* v. *San Francisco* 391

2. Receiver of national bank, appointed by Comptroller of Currency under Rev. Stats., § 5234, is an officer of the United States and not an agent of bank. *United States* v. *Weitzel* 533

REHEARING. See **Procedure**, IV.

REMITTITUR. See **Employers' Liability Act**, 13.

REMOVAL OF CAUSES. See **Jurisdiction**, III, 13; IV (1).

REPARATION. See **Interstate Commerce Acts**, II, 5.

RESIDENCE. See **Jurisdiction**, II.

Of corporation within meaning of § 7 of Sherman Act. See **Anti-Trust Act**, 4.

RES JUDICATA. See **Judgments**, 4, 8.

REVIVOR. See **Parties**, 5.

RIPARIAN RIGHTS. See **Waters.**

SALARIES AND ALLOWANCES. See **Canal Zone.**

SECRETARY OF THE INTERIOR. See **Indians**, 2–4, 7, 9–12, 15.

As to judicial interference with. See **Jurisdiction**, I, 5.

SECRETARY OF THE TREASURY. See **Customs Law.**

SERVICE OF PROCESS. See **Jurisdiction**, II; III, 22.

SHEEP AND CATTLE SEGREGATION. PAGE
Validity of Idaho law. See *Omaechevarria* v. *Idaho* 343

SHIPPING. See **Admiralty.**

STATES. See **Boundaries; Constitutional Law; Jurisdiction; Statutes; Taxation.**

1. The principle which forbids the production of state governmental inequality by affixing conditions to a State's admission is irrelevant to the question of power to enforce the contract in this case. *Virginia* v. *West Virginia* 565

2. Police power extends over the federal public domain, at least in absence of legislation by Congress. *Omaechevarria* v. *Idaho* 343

STATUTES. See Table of Statutes Cited, at front of volume; **Abandoned Property Act; Bankruptcy; Criminal Law; Employers' Liability Act; Extradition; Food and Drugs Act; Indians; Interstate Commerce Acts; Intoxicating Liquors; Jurisdiction; National Banks; Patents for Inventions; Public Lands.**

I. **Principles of Construction.**

1. In the construction of statutes defining crimes there can be no constructive offenses, and to warrant punishment the case must be plainly and unmistakably within the statute. *United States* v. *Bathgate* 220

2. Statutes creating and defining crimes are not to be extended by intendment upon ground that they should have been made more comprehensive. *United States* v. *Weitzel* .. 533

3. Intention of Congress is to be sought for primarily in language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture. *Thompson* v. *United States* 547

4. Presumed that intention to change law as declared by this court will be expressed by Congress in plain terms, rather than in such as are consonant with and within the scope of this court's previous decision. *Id.*

5. It has been the policy of Congress not to interfere with

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elections within a State except by clear and specific provisions. *United States* v. *Bathgate* 220

6. When the meaning of an expression has been definitely settled by prior decisions of this court it will be assumed that Congress in using that expression without qualifying words adopted the meaning thus attached to it. *Louisville Cement Co.* v. *Interstate Com. Comm.* 638

7. A statute of limitations should be strictly construed in favor of the Government. *United States* v. *Whited & Wheless* 552

8. Grants of rights or privileges by State or its municipalities are strictly construed; what is not unequivocally granted is withheld; nothing passes by mere implication. *City of Mitchell* v. *Dakota Tel. Co.* 396

II. **Particular Statutes.**

1. *Act of August 13, 1894, 28 Stat. 278*, construed liberally for the protection of those who furnish labor or materials in the prosecution of public works; and neither that act, nor the amendatory act of 1905, is limited in application to labor and materials directly incorporated into the public work. *Brogan* v. *National Surety Co* 257

2. *California Pol. Code*, § *3647*, covers money placed in bank as special deposits pursuant to order of court and stipulation of parties to await outcome of litigation. *Spring Valley Water Co.* v. *San Francisco* 391

3. *Idaho Sheep and Cattle Segregation Law* (Rev. Codes, 1908, § 6872) upheld. *Omaechevarria* v. *Idaho* 343

4. *Illinois Dram Shop Act* (Rev. Stats., c. 43, § 10) upheld. *Eiger* v. *Garrity* 97

5. *Louisiana Act of 1904* (Laws, 1904, Act No. 54) as amended in 1908, providing for service of process, *held* not applicable to foreign corporations which have withdrawn from State. *People's Tobacco Co.* v. *American Tobacco Co.* .. 79

6. *Massachusetts Corporation Tax Law* (Stats. 1914, c. 724, § 1) *held* invalid. *International Paper Co.* v. *Massachusetts* .. 135
Locomobile Co. v. *Massachusetts* 146

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7. *Massachusetts Corporation Excise Law* (Stats. 1909, c. 490, Pt. III, § 56) held valid. *Cheney Brothers Co.* v. *Massachusetts* 147

8. *Minnesota Laws, 1913, c. 78, § 1*, requiring that sidewalks be built over railroad right of way, upheld. *Great Northern Ry.* v. *Clara City*..... 434

9. *Philippine Code of Civ. Proc., § 581*, construed broadly as relating not merely to court proceedings, but as expressly preserving existing powers and usufructuary rights of parents over property of minor children, existing under Civil Code. *Ibanez* v. *Hongkong Banking Corp*..... 621

10. *Philippine Civ. Code, Art. 1851*, as to effect of failure of creditor to sue when obligation matures. *Ibanez* v. *Hongkong Banking Corp*..... 627

11. *Texas Office-Shops Act of 1889*, prohibiting removal of offices and shops of railroads located by contract within a county in consideration of county bond aid, extends to successor by mortgage foreclosure of contracting railroad. *International & G. N. Ry.* v. *Anderson Co*..... 424

12. *Texas Stats., Art. 5699;* jurisdiction of suit to contest validity of will. *Sutton* v. *English*..... 199

13. *Virginia License Tax Law*, Acts 1915, c. 148, p. 233, upheld. *Armour & Co.* v. *Virginia*..... 1

14. *Virginia Corporation Privilege Tax Law* (Acts 1910, c. 53, § 38a), upheld as not arbitrary or unreasonable under all the circumstances, though case on border line. *General Railway Signal Co.* v. *Virginia*..... 500

STOCK GRAZING LAWS. See **Constitutional Law**, VII, 2, 6, 15; **Public Lands**, III.

STOCKHOLDERS. See **Jurisdiction**, II, 4.

STREET RAILWAYS. See **Franchises**, 2–5.

A street railroad is one of the ordinary incidents of a city and with respect to the municipal granting power stands on a different footing from steam railroads habitually run over separate rights of way. *Covington* v. *South Covington St. Ry. Co.*..... 413

STREETS AND HIGHWAYS. See **Franchises.** PAGE

Police power extends to requiring railroad companies, at own expense, to make streets and highways crossed by their tracks reasonably safe and convenient for public use by making sidewalk across right of way. *Great Northern Ry.* v *Clara City* 434

SUBROGATION. See **Admiralty, 4.**

SUBSTITUTION OF PARTIES. See **Procedure VI.**

SURETIES. See **Bonds; Philippine Islands, 3.**

TAXATION:

Immunity of interstate commerce from state taxation. See **Constitutional Law,** III, 6–10.

As to amount and method of taxation essential to satisfy judgment of this court in suit between States. See *Virginia* v. *West Virginia* 565

I. **Construction of Tax Acts.**

1. *Nature of Tax; on Property or Earnings.* In determining whether a state tax is to be viewed as a tax on property measured by earnings or a tax on earnings, the view of state court and legislature, though not conclusive, will not be rejected unless ill founded. *Cudahy Packing Co.* v. *Minnesota* 450

2. *Id. Double or Excessive Taxation.* A tax on a company owning freight cars which it furnished to railroads for a fixed compensation, *held* not to be deemed double or excessive from fact that receipts of railroads from shipments in such cars, less rental paid to owning company, were made a factor in valuing property on which railroads were taxed. *Id.*

II. **State Taxation. Legitimate Purposes and Subjects.**

1. *Immunity of Interstate Commerce.* Immunity from state taxation is universal and covers every class of such commerce, including that conducted by merchants and trading companies no less than what is done by common carriers. *International Paper Co.* v. *Massachusetts* 135

2. *Property Employed in Interstate Commerce.* A state tax on a company owning freight cars which were employed by

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railroads in hauling both interstate and intrastate commerce, *held* a property tax and not one on gross earnings burdening interstate commerce. *Cudahy Packing Co.* v. *Minnesota* 450

3. *Id.* Property constituting a freight car line, used or employed regularly and habitually in a State, is within the taxing power of that State, although chiefly devoted or applied to interstate transportation, and may be taxed at its real value as part of a going concern. *Id.*

4. *Foreign Corporations; Property Tax.* A State is wholly without power to impose a tax upon property of a foreign corporation beyond its jurisdiction, and it is of no moment whether the corporation be a carrier or a trading company. *International Paper Co.* v. *Massachusetts* 135

5. *Id. Excise Taxes.* Where material part of business conducted in State by foreign corporation is intrastate the company is subject to licensing power of State. *Dalton Adding Machine Co.* v. *Virginia* 498
General Railway Signal Co. v. *Virginia* 500

6. *Id.* A state law imposing a fee for the privilege of doing local business of $1,000 on foreign corporations with capital over $1,000,000 and not exceeding $10,000,000, upheld. *General Railway Signal Co.* v. *Virginia* 500

7. *Id.* State may impose different rate of taxation upon foreign corporations for privilege of doing local business than it imposes upon primary franchises of own corporations; and, by merely licensing foreign corporation to engage in local business, and acquire local property, it does not surrender or abridge, *quoad* such corporation, its power to change and revise its taxing system and tax rates. *Cheney Brothers Co.* v. *Massachusetts* 147

8. *Id.* Massachusetts Stats., 1909, c. 490, Pt. III, § 56, imposing an annual excise upon every foreign corporation, for the privilege of doing business, of a given per cent. of par value of its authorized capital stock, subject, however, to a maximum limit of $2000, *held* valid, as to corporation doing local as well as interstate business. *Id.*

9. *Id.* Activities *held* to constitute local business, affording bases for taxation. *Id.*

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10. *Id.* License tax imposed under law of Virginia of 1915, taxing merchants doing business in State on basis of amount of purchases, but excluding from its operation manufacturers taxed on capital by State, who offer their product for sale at place of manufacture, *held*, as applied to a foreign corporation and as computed on the basis of merchandise manufactured by it in other States and shipped into Virginia for sale at its agencies there, not to offend the equal protection clause, or abridge the privileges and immunities of the corporation guaranteed by Art. IV of the Constitution, and 14th Amendment, or constitute an unconstitutional burden on interstate commerce. *Armour & Co.* v. *Virginia* 1

11. *Id.* As to power of State in respect of license fees or excise taxes imposed on foreign corporations doing interstate as well as local business. See *International Paper Co.* v. *Massachusetts* 135

12. *Bank Deposits.* Money placed in bank as special deposits, pursuant to orders of District Court and stipulation of parties, to await outcome of litigation, *held* subject to assessment for taxation under § 3647, Pol. Code of California. *Spring Valley Water Co.* v. *San Francisco* 391

13. *Id.* Such deposits sufficiently described for purposes of assessment by numbers of the several cases in which made, and by designating court and parties; and facts that deposit in each case was not assessed separately, and that description included also case in which there was no deposit, do not vitiate assessment. *Id.*

14. *Indian Property.* Acts of 1906 and 1912, respecting Osage Indians, do not authorize Secretary of Interior to impose restrictions upon private land purchased for non-competent allottee with his trust money, previously released, and thus exempt it as a governmental instrumentality from state taxation. *McCurdy* v. *United States* 263

III. **Unconstitutional Excises on Corporations.**

1. *Excise Measured by Capital Stock.* License fee or excise of a given per cent. of par value of entire authorized capital stock of foreign corporation doing both local and interstate business and owning property in several States, is a tax on entire business and property of corporation, and is void both

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as an illegal burdening of interstate commerce and as a deprivation of property without due process of law. *International Paper Co.* v. *Massachusetts* 135

2. *Massachusetts Law.* Tax exacted under § 1, c. 724, Massachusetts Stats. 1914, for privilege of doing local business, from a foreign corporation largely engaged in interstate commerce, and whose property and business were largely in other States, *held* void. *International Paper Co.* v. *Massachusetts* 135
Locomobile Co. v. *Massachusetts* 146

3. *Burden on Interstate Commerce.* Where foreign corporation maintains and employs local office, with stock of samples and force of office and traveling salesmen, merely to obtain orders locally and in other States, subject to approval by home office, for its goods to be shipped directly to its customers from its home State, the business is part of its interstate commerce and not subject to local excise taxation; and action of such office in obtaining orders from customers residing in home State of corporation and in transmitting them to home State where they are approved and filled, is interstate intercourse in State where office is established. *Cheney Brothers Co.* v. *Massachusetts* 147

4. *Id.* That a local business stimulates interstate business and its abandonment would have the opposite effect does not make it any the less local. *Id.*

TAXES:

As element in estimating value of leasehold. See *Manufacturers Ry. Co.* v. *United States* 457

TEA BOARD. See **Customs Law.**

TELEPHONE COMPANIES. See **Franchises, 7.**

TENNESSEE:

Boundary line between Tennessee and Arkansas is middle of main channel of navigation of Mississippi as it existed in 1783, subject to such changes as have occurred through natural and gradual processes. *Arkansas* v. *Tennessee* 158
Cissna v. *Tennessee* 289

TERMINALS. See **Interstate Commerce Acts.** PAGE

TEXAS:

1. County court has no equitable jurisdiction of suit *inter partes* to annul dispositions in will and partition property among heirs, where title to land is involved, and amount in controversy exceeds $1,000. *Sutton* v. *English* 199

2. District courts have no jurisdiction to annul by an original proceeding the action of a county court in probating a will, and a suit under Stats., Art. 5699, to contest validity of will so probated, must be brought in county court and calls for exercise of original probate jurisdiction. *Id.*

3. Prohibition against removal of offices and shops located by contract with county in consideration of county bond aid, extends, under Act of 1889, to successor by mortgage foreclosure of contracting railroad. *International G. & N. Ry.* v. *Anderson County* 424

TITLE. See **Indians; International Law; Patents for Inventions; Public Lands.**

TRADEMARKS:

1. Trademark for one variety of goods includes other varieties of the same species. *Rock Spring Co.* v. *Gaines & Co.* ... 312

2. An adjudication that, as against B, A is entitled, by prior appropriation, to use a trademark on "blended" whiskey, protects A, as against B, in its use on "straight" whiskey. *Id.*

3. In a suit by G to enjoin R from using trademark on "straight" whiskey, claimed by former through prior appropriation, a former decree, set up by R claiming to be acting as agent of H, dismissing bill in former suit brought by G against predecessors of H, to enjoin them from using the same mark on "blended" whiskey, *held* a bar, notwithstanding the later suit related to "straight" whiskey and notwithstanding subsequent registration of trademark by plaintiff for "straight" whiskey. *Id.*

TRUST FUNDS:

Supervision of trust funds of Indians. See **Indians**, 14, 15.

TRUSTS AND TRUSTEES. See **Indians.**

"TWENTY-EIGHT HOUR LAW." See **Interstate Commerce Acts**, II, 7, 8. PAGE

UNIFORM LIVE STOCK CONTRACT. See **Interstate Commerce Acts**, II, 1, 2.

UNITED STATES. See **Contracts**, 3–7.

1. Suit to restrain Assistant Postmaster General from annulling a contract *held* suit against United States. *Wells* v. *Roper* 335

2. Receiver of national bank, appointed by Comptroller of Currency under Rev. Stats., § 5234, is an officer of the United States and not an agent of bank. *United States* v. *Weitzel* 533

3. Right to use patented inventions. See **Patents for Inventions.**

VERDICT:

In so far as it depends upon the testimony, verdict of jury, upon issues requested by complaining party, finding that state regulation as to location of railway offices and shops does not burden interstate commerce, will be accepted. *International & G. N. Ry.* v. *Anderson Co.* 424

Remittitur. See **Employers' Liability Act**, 13.

VESSELS. See **Admiralty.**

WAR-MAKING POWER. See **Constitutional Law**, II, 3.

WARRANTY:

Of seaworthiness of vessel. See **Admiralty.**

WATER COMPANIES:

1. Mere incorporation and organization under general laws of Ohio, with power to construct and operate hydro-electric power system at places designated, and to take water rights and riparian property for that purpose, does not imply contract between State and company that supply of water available shall not be diminished; and subsequent appropriation of the water by city under state authority held not to impair the obligation of the contract. *Sears* v. *City of Akron* 242

2. Right of appropriation of water, with power of condemnation, acquired by company organized under general laws

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of Ohio, under which no property had been acquired, *held* subject to State's reserved power, and that an appropriation of the water by a city, under authority of the state legislature, was not an unconstitutional taking of the company's property. *Id.*

3. Provisions of ordinance fixing rates which water company, whose franchise had expired, might charge in future, providing for collection of charges in advance, and requiring installation of meters and hydrants, and imposing fines for violation of ordinance, *held* to confer, impliedly, privileges necessary to enable company to continue service, and so, as granting new franchise of indefinite duration, terminable by either city or company at such time and under such circumstances as would be consistent with duty owed to inhabitants. *Denver* v. *Denver Union Water Co.*..... 178

4. A net return of 4.3% of value of plant, afforded by ordinance rates, *held* insufficient, and that ordinance fixing such rates amounts to taking of company's property without due process of law. *Id.*

5. In valuing plant of public service company as basis for determining adequacy of rates fixed, it is proper to estimate land at present market value, and structures at the reproduction cost less depreciation; also the "going concern value." *Id.*

6. In determining whether rates fixed by ordinance allowed an adequate return, such water company's plant not to be valued as "junk," but as property useful and in use in the public service; nor is question of value greatly affected, if at all, by fact that there is neither right nor obligation to continue use perpetually, or for any long period that may be defined in advance. *Id.*

7. Whether, in Colorado, company under franchise contract to furnish water for a city, becomes owner of water rights initiated by it, not decided. *Id.*

WATERS:

Navigable river as boundary between States. See **Boundaries.**

Appropriation in Colorado. See **Water Companies,** 7.

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1. How land that emerges on either side of a navigable interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. *Arkansas* v. *Tennessee* 158

2. Where no direct taking under power of eminent domain, a riparian owner complaining of act of a city in damming and diverting stream for municipal water supply, remitted to action at law for damages, unless injury clear and exceptional circumstances are present warranting resort to equity. *Sears* v. *City of Akron* 242

WILLS:

As to jurisdiction of state and federal courts of suit to annul will. See *Sutton* v. *English* 199

As to jurisdiction of this court where probate of will of Indian refused solely on ground of mental incapacity. See *Bilby* v. *Stewart* 255

WORDS AND PHRASES. See **Statutes**, I, 3, 4, 6.

"Cause of action accrues" as used in § 16 of Act to Regulate Commerce. See *Louisville Cement Co.* v. *Interstate Com. Comm* 638

"Compound." See **Food and Drugs Act.**

"Resides or is found" as in § 7 of Sherman Act. See *People's Tobacco Co.* v. *American Tobacco Co.* 79

WRIT OF ERROR. See **Jurisdiction.**

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